Supreme Court, U.S.
FILED
AUG 18 2009
OFFICE OF THE CLERK

No. 09-213

In The

Supreme Court of the United States

NORTHEASTERN LAND SERVICES, LTD.,
d/b/a THE NLS GROUP,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the National Labor Relations Board ("Board") have authority to decide cases with only two sitting members, where 29 U.S.C. § 153(b) provides that "three members of the Board shall, at all time, constitute a quorum of the Board"? If so, what deference should be afforded said decision on Appeal?

2. Assuming *arguendo* authority, did the two (2) member Board panel err in abandoning *sub silencio* a long standing precedent, *Republic Aviation Corporation v. NLRB*, 324 U.S. 793 (1945), in favor of a rule of law, to determine a violation of 29 U.S.C. § 158(a)(1)?

3. In a matter involving no union or concerted activity, no anti-union animus, and no express violation of the National Labor Relations Act, did the Board have authority to order relief to an individual who engaged in no activity protected by the Act?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Pursuant to Rule 14.1(b), the caption contains the list of all parties appearing here and before the United States Court of Appeals for the First Circuit. Pursuant to Rule 29.6, petitioner states that Northeastern Land Services, LTD., d/b/a is a corporation incorporated in the State of Rhode Island, and that it is not a publicly held corporation.

Therefore, no publicly traded company owns 10% or more of the stock of Northeastern Land Services LTD.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Northeastern Land Services, LTD., d/b/a The NLS Group ("NLS") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in *Northeastern Land Services, LTD., d/b/a The NLS Group v. NLRB*, No. 08-1878.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit (App. 1) is published at 560 F.3d 36 (1st Cir. 2009).

A Petition for Hearing En Banc of Petitioner NLS was denied by the United States Court of Appeals for the First Circuit on May 20, 2009 (App. 59). This decision has not been published in the federal reporter.

JURISDICTION

The Court of Appeals filed its opinion on March 13, 2009 and Petitioner's Petition for Rehearing En Banc was denied on May 20, 2009 (App. 59). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of the National Labor Relations Act (the "Act"), 29 U.S.C. §§ 151 *et seq.* The pertinent provisions are reproduced below:

> "Sec. 2(b). The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. 29 U.S.C. § 153(b).
>
> Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . 29 U.S.C. § 157.
>
> Sec. 8. (a) It shall be an unfair labor practice for an employee –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;. . . . 29 U.S.C. § 158.
>
> Sec. 10. (c) Reduction of testimony to writing; findings and orders of Board. The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and

filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged

> in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

STATEMENT OF THE CASE

To summarize, the Board has lacked a quorum since December 31, 2007 but continues to issue decisions.

In NLS, the Board and the General Counsel did not meet the burden of proof and the Decision is not

supported by either a preponderance of the evidence or substantial evidence.

Also, the First Circuit erred in affirming the Board two (2) member panel's rejection, *sub silencio*, of *Republic Aviation*.[1] Neither substantial evidence nor law supports these conclusions. The First Circuit erroneously upheld the Board panel's misapplication of NLRB precedent, *Lafayette Park Hotel*, 159 LRRM 1243 (1998) (which cites with approval *Republic Aviation*, *supra*, or the post *NLS* ALJ decision, *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (" . . . Applying the Board's standard as set out in *Lafayette Park Hotel* . . . ").

Lastly, the First Circuit erroneously upheld the Board's Order reinstating the charging party with backpay ("where the Board finds an employer rule invalid, discharge for violating the rule is invalid," Decision Page 15), absent union or concerted activity, or anti-union animus, and despite unprotected misconduct, Section 10(c), 29 U.S.C. § 160(c).

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[1] The Panel upheld rejection of the long-standing "balancing test" without explanation or requiring any explanation from the Board panel for its rejection. Little, if no deference should be given abandonment of a long standing rule, *Universal Camera*, *infra*.

STATEMENT OF FACTS

As a preliminary matter, neither the Petitioner, Board, nor its General Counsel dispute the findings of fact or credibility determinations found by the Board's Administrative Law Judge in his Decision dated June 27, 2002. The Board and its General Counsel concede NLS was not engaged in anti-union activity, nor had any anti-union animus. Likewise, NLS, the Board, and its General Counsel concede the charging party was neither engaged in union or concerted activity. The Circuit Court of Appeals for the First Circuit concurs in all of the above.

By way of background, NLS is a labor supplier that provides temporary workers to client companies in the natural gas and telecommunications industries. NLS provides "right-of-way agents," who acquire land rights for NLS clients when such rights are needed in order to lay, and maintain, natural gas pipelines or fiber optic cables.

The charging party, Jamison John Dupuy, was employed by NLS as a right-of-way agent from February to November 2000, and from July to October 2001. At the outset of each period of employment with the company, Dupuy signed a "Temporary Employment Agreement" ("Agreement") (App. 67). Contained in that section of the Agreement addressing business competition is a confidentiality clause.

During his second period of employment with NLS, in 2001, charging party was assigned to work

on a project for NLS client El Paso Energy ("El Paso"). During charging party's first period of employment with the Company, El Paso Project Manager, Rick Lopez, told charging party to contact NLS to be placed on a new El Paso project. Charging party did so and began employment in July 2001.

In his first few months on the El Paso project, charging party repeatedly received his pay late. Charging party brought the problem to the attention of various company administrators, including the Office Manager, Financial Officer and NLS Executive Vice President and Chief Operating Officer Jesse Green. As the problem persisted, charging party explained that the delays were creating a "cash flow problem." During attempts to resolve the problem, charging party was not fully cooperative and insulting towards the Office Manager, Green's wife, and the Chief Financial Officer.

In early October, on the advice of its outside accountants, NLS began treating charging party's computer allowance as taxable income and NLS withheld taxes. Charging party complained to Green and stated that this tax treatment was error and not consistent with the Internal Revenue Code. Charging party also brought his grievance to El Paso's Lopez who informed charging party it was an NLS matter. Issues between NLS and charging party continued to fester.

On October 11, 2001, Green told Dupuy that the NLS had done its best to accommodate his various

requests, but it seemed the company could never make him happy, and therefore the company thought it best to terminate his employment. Charging party stated he had filed a claim for unpaid wages with the Commonwealth of Massachusetts. Green professed ignorance of any such filing. When charging party demanded a more explicit basis for his termination, charging party protested that the Company could not fire him. Green stated that the company could indeed do so, because charging party had "not lived up to [his] end of the bargain." At the NLRB hearing Green stated the bargain to which he referred was the confidentiality clause in the Agreement. Charging party never engaged in union activity, concerted activity, or other activity protected by the Act.

Following the filing of a charge with the NLRB, an Administrative Law Judge found no violations six years later on June 27, 2002. Board Chairman Schaumber and Member Liebman found, as a matter of law, the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by maintaining an overly broad confidentiality provision in its Agreement, and, because said provision, allegedly violated the Act, and terminating charging party for breaching that provision also violated the Act. Among other things, the Board ordered charging party reinstated to his former job or, a substantially equivalent position; to be made whole for lost earnings and other benefits; for NLS to remove from the Company's files any reference to the unlawful discharge of charging party and to notify charging party that this has been done

and that the discharge will not be used against him in any way; and NLS to post a remedial notice.

ARGUMENT

I. The Board Lacked A Quorum. This Issue Has Resulted In A Split Between Circuits And Has Unsettled National Labor Policy.

The Board is the appellate body charged with enforcing the Act. It creates and enforces U.S. labor policy. Its decisions maintain industrial peace and shape the future of national labor relations law. Since December 31, 2007, the authority of the Board is in doubt because it lacks three (3) members or a quorum (as required by statute). *See* NLRB Unopposed Motion of the National Labor Relations Board To Stay The Mandate in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB* (D.C. Cir. No. 08-1162, No. 08-1214) (App. 61).

Specifically, a lawful quorum of the Board on December 28, 2007 delegated all powers to Members Schaumber, Liebman, and Kirsanow. Member Kirsanow's term expired three days later. These Board members knew at the time Kirsanow would not be a member after December 28, 2007. Section 3(b), 29 U.S.C. § 153, does not grant blanket authorization to delegate indefinitely, to two (2) members. Section 3(b) of the Act, 29 U.S.C. § 153(b), requires three members "at all times" constitute a quorum. Congress appreciated the need for full discourse and

review in the decision making process to avoid undue concentration of decision making power in a lesser number. The third member may provide either insight or reasoning that ultimately persuades the other two members.[2]

This delegation, a two (2) member panel, has resulted in considerable uncertainty, litigation, and a split between Circuits. In *NLS*, 560 F.3d 36 (1st Cir. March 13, 2009) *rehearing denied* (May 20, 2009), the First Circuit upheld the lawfulness of a two (2) member panel, and became the first Circuit to address the issue. Soon thereafter, on May 1, 2009, the D.C. Circuit in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009) found the Board without power to act since December 31, 2007 because the Board lacked a three (3) member quorum.

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[2] In *Ayrshire Collieries Corp. v. U.S.*, 331 U.S. 132, 136 (1947), the Court vacated a decision of a three-judge court when only two judges participated because of illness of the third judge. The Supreme Court held: " . . . we cannot say that the failure of the third judge to participate in the determination of a case, where the other two are in agreement as to the result, is without significance. The decision reached by two judges is not necessarily the one which might have been reached had they had the benefit of the views and conclusions of the third judge. And should the latter have publicly indicated an opinion differing from that of his colleagues, his position might be helpful to the litigants and to this Court if the case were appealed." *Id.* at 139.

Contrary to the D.C. Circuit, the Seventh Circuit upheld the legality of the two (2) member Board Panel. *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009). New Process Steel, L.P. filed a Petition for Writ of Certiorari on this issue. Said Petition is pending (77 U.S.L.W. 3670). Subsequently the Second Circuit in *Snell Island SNF LLC d/b/a Shore Acres Rehabilitation and Nursing Center, LLC v. NLRB*, 568 F.3d 410 (2d Cir. June 7, 2009) also upheld the legality of two (2) member panels. As stated in the Board's Motion to Stay to the D.C. Circuit, the uncertainty created by divergent decisions has a substantial impact on the Board and its decision making authority, particularly, since the Board is domiciled in the D.C. Circuit and any party can appeal a decision to that Circuit.

NLS concurs in the decision of the D.C. Circuit in *Laurel Baye* and incorporates by reference the arguments put forward by *New Process Steel, L.P.*

Further *NLS* states its objection to the two (2) member panel not acting consistent with law and without support of the preponderance of the facts, or substantial evidence. Administrative Procedures Act, 5 U.S.C. § 556(d).

Independently, the two (2) member Board disregarded the fact balancing test of *Republic Aviation*, *sub silencio*, in favor of a rule of law test. A two (2) member Board should not have authored a decision radically departing from long established precedent and without any explanation for its departure.

Further, as it related to remedy, the Board's decision in this case, 352 NLRB 744 (2008), states at Footnote 9, App. 22:

> Chairman Schaumber agrees with his colleague that application of *Double Eagle Hotel & Casino* dictates a finding that Dupuy's termination violated Sec. 8(a)(1) of the Act. However, he questions the theory that an employer's imposition of discipline pursuant to an unlawfully overbroad rule is necessarily unlawful, such as in situations where the discipline imposed is for a lawful reason albeit under an overly broad, unlawful rule. Nonetheless, he applies precedent for institutional reasons for the purpose of deciding this case.

Not only is it inconsistent that two (2) members would take it upon themselves to reject the stabilizing influence of this Court's precedent, *Republic Aviation*, *supra*, but two (2) members have decided a case in which one member expresses reservations. The *NLS* decision belies the notion that the two (2) members are deciding cases where there otherwise would be broad consensus.

II. The NLS Two (2) Member Board Panel Abandoned Supreme Court Precedent, *Republic Aviation, sub silencio.* Said Decision Is Erroneous And Is And Will Be Highly Disruptive Of Industrial Labor Policy.

In *Republic Aviation*, *supra*, the seminal 8(a)(1) decision, the Supreme Court held:

> These cases bring here for review the action of the NLRB in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.

324 U.S. at 797-798.

As conceded by the Board and the First Circuit, the two (2) member panel abandoned this balancing test and substituted a rule of law requiring no factual support. Its members substituted their biases in regard to industrial relations for precedent. The Panel erroneously deferred.[3] The Decision unlawfully

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[3] Likewise, the *NLS* holding also disregards rules of law applied to decide *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), *NLRB v. Erie Resistor Corporation*, 373 U.S. 236 (1963)

(Continued on following page)

expanded the Board's jurisdiction to inaugurate a new national labor policy.

Prior to the *NLS* decision, in 1998, a five member Board in *Lafayette Park Hotel*, *supra*, reviewed a series of employer rules challenged by a union during an organizing drive.[4] The majority wrote, with *NLS* Member Liebman dissenting:

> Resolution of the issue presented by the contested rules of conduct involves "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishment. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society." *Republic Aviation v. NLRB*, 324 U.S. 793, 797-798 (1945). In determining whether the mere maintenance of rules such as those at issue here violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. *Where the rules are likely to have a chilling effect on*

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(8)(a)(3). Even if *conduct* is "inherently destructive," an employer may come forward with business justification, and Board has duty to strike balance between business justification and "invasion of employee rights," and cases too numerous to cite.

[4] The challenge to the rules in *Lafayette Park* and *Lutheran Heritage* arose in the context of union activity or representation. The Board refused to engage in hypothetical decision making.

> *Section 7 rights*, the Board may conclude that their maintenance is an unfair labor practice, even *absent evidence of enforcement*.

Applying the foregoing test, the Board majority upheld various rules, including a requirement to support the "goals and objectives" of the Employer, a rule forbidding release of "Hotel – private" information to other individuals or entities, and other rules.

In 2002, the *NLS* ALJ, applying *Lafayette Park*, *supra*, found the contested NLS provision lawful, and dismissed the Complaint.

While the *NLS* case was pending, in 2004, in *Lutheran Heritage*, *supra*, a five member Board was called upon to review various rules in the context of a labor dispute. A 3-2 Board majority, Member Liebman dissenting, held in part:

> The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful, *the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Id.* at 825, 827. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of *whether the rule* ***explicitly*** *restricts*

> *activities protected by Section 7.* If it does, we will find the rule unlawful.
>
> If the rule does not explicitly restrict activity protected by Section 7, the violation is *dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity*; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights (emphasis added).

Again, the Board did not abandon *Republic Aviation*, *supra*. Contrary to the Board's and First Circuit's *NLS* holding, the majority in *Lutheran Heritage*, *supra*, did not depart from *Lafayette Park*, *supra*, but merely stated its test succinctly.

Among the many rules upheld in *Lutheran Heritage*, *supra*, was a rule prohibiting "abusive or profane language." The majority, affirming the ALJ held:

> Applying these principles, we find that the Respondent has not violated Section 8(a)(1) by maintaining the challenged rules prohibiting abusive or profane language. An employee whose Section 7 activity involves behavior of this type may be protected by Section 7 in some cases, but in other cases the conduct will be unprotected. *Id.* Absent application of the rule to the former conduct, we would not presume that the rule is unlawful.

The dissent, including Member Liebman, however, found the "profanity rule" unlawful because, pursuant to a "hypothetical test," it could be applied in an unlawful manner.[5]

But in *NLS*, the two (2) member Board panel, while acknowledging the challenged provision did *not* expressly violate Section 7 (misapplied *Lafayette Park, supra*, and *Lutheran Heritage, supra*) jettisoned *Republic Aviation, supra*, and without supporting facts on the record, held the provision could "chill" hypothetical NLS employees in the exercise of their Section 7 rights. The ALJ had found that the contested provision served a legitimate business interest and is unrelated to Section 7 activity. The Board's analysis affords the Board unpredictable and unrestrained power, and rather than serving industrial peace creates uncertainty and opens the floodgates of litigation.

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[5] To reinforce that the *Lutheran Heritage* majority did not jettison *Republic Aviation* or its balancing test, the dissent wrote, "As explained below, we rely not only on the fact that the overbroad rules at issue here could reach activity that is protected, but also on the particular language of the rules, *the Respondent's maintenance of other facially unlawful rules, and the existence of seemingly duplicative rules as providing a context in which employees would reasonably construe the rules as interfering with their Section 7 activity.*" None of these factors are present in *NLS*.

III. The Two (2) Member NLS Board Panel Neither Applied A Preponderance Of Facts Test Or Substantial Evidence On The Record Test. It Substituted A Rule Of Law Test. Said Test Is Neither Supported By Statute Nor Its Regulations, And Is Inconsistent With The Rule Of Law.

The failure of the General Counsel to sustain the burden of proof before the Board and Court by a preponderance of the facts on the record and by substituting, in lieu of facts, a "rule of law," is beyond the Act and the Board's authority. It is an unexplained departure from precedent and the rule of law which will destabilize national labor policy.

The General Counsel did not prove by a preponderance of the evidence that the contested Provision[6] violated the Act that charging party's termination was a violation of the Act, or that charging party is entitled to reinstatement with backpay. These failures are fatal. *See* 29 U.S.C. § 158. "If upon a preponderance of the testimony taken, . . . the Board shall state its findings of fact. . . ." 29 U.S.C. § 160(c); Likewise, 29 C.F.R. § 101.10(b); also, *NLRB v. Wright Line, A Division of Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982) (burden of proof by preponderance of evidence upon General Counsel); *NLRB v. Mount Desert Island Hospital*, 695 F.2d 634 (1st Cir. 1982). The Board's

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[6] (App. 67).

standard "employees would reasonably construe the language of the rule to prohibit Section 7 activity," 352 NLRB at 745 is hypothetical, speculative, and not supported by evidence as required by the Act and its regulations, and disrupts national labor policy. The impact of the *NLS* decision affects every employer and their ability to maintain order in their workplaces.

Likewise, the NLS Board and First Circuit decisions are not supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), states, in pertinent part:

> . . . The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. . . . Congress has imposed on them [the courts] responsibility for assuring that the Board keeps within reasonable grounds. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

Id. at 488, 490.

IV. The NLRA Protects Employees Engaged In Concerted Or Protected Activity. The *NLS* Two (2) Member Board Decision Remedy Is Beyond This Limitation. Said Decision Will Lead To Uncertainty, Disrupts Industrial Regulations, And Is Destabilizing.

A two (2) member Board Panel should not be expanding Board law to protect individuals not engaged in protected activity. *NLS* Board Decision (Footnote 9, App. 22). Further, the Board has no authority under the Act to award a remedy in the absence of union or concerted activity, anti-union activity or anti-union animus. Such a remedy is a non-legislative radical departure from the law and destabilizing of national employment policy. To permit the Act to be expanded by finding "hypothetical" employees may be chilled, is a legal decision not supported by the facts or Act.

The Board and First Circuit upheld charging party's reinstatement and award of backpay on the basis of inapplicable Board law. The First Circuit states in this case:

> "[W]here discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule." *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 n.3. (2004), *enforced*, 414 F.3d 1249 (10th Cir. 2005).

560 F.3d at 44.

However, each case cited by either the two (2) member Board panel or the First Circuit[7] are cases in which the employee(s) were discharged or disciplined for violation of an unlawful rule *AND* the employee(s) had been engaging in union or concerted activity or there was union or concerted activity. No cited case has ever stood for the proposition that an employee who is not engaged in union or concerted activity but is discharged for unprotected activity in alleged violation of an overbroad rule is entitled to reinstatement. Application of the supposed two (2) member panel reinstatement rule, absent any evidence of protected activity, unlawfully expands the Act. For example, in *Yesterday's Children, Inc. v. NLRB*, 115 F.3d 36 (1st Cir. 1997), the Court held: "There can, of course, be no violation of § 8(a)(1) by the employer if there is no underlying § 7 conduct by the employee. Conduct must be both concerted and protected to fall within § 7." Until *NLS*, said rule has been uniformly applied under the Act.

Specifically, under Section 10(c) of the Act, 29 U.S.C. § 160, the Board is charged with the duty to

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[7] *Saia Motor Freight Line, Inc.*, 333 NLRB 784 (2001) (distribution union literature); *A.T.&S.F. Memorial Hospitals, Inc.*, 234 NLRB 436 (1978) (union organizing, distribution union literature); *Cintas Corporation*, 344 NLRB 943 (2005) (union organizing); *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), *aff'd*, 414 F.3d 1249 (10th Cir. 2005) (concerted activity and union activity); *Opryland*, 323 NLRB 723 (1997) (union organizing drive); *NLRB v. McCullough Environmental Services*, 5 F.3d 923 (5th Cir. 1993) (organizing drive).

fashion remedial orders which effectuate the purposes and policies of the Act. But as Board Members Fanning, Jenkins and Murphy wrote in *Baptist Memorial Hospital*, 229 NLRB 45, *aff'd*, 568 F.2d 1 (6th Cir. 1977), " . . . any relief must bear rational relationship to the unfair labor practice found." Here, there are no facts or substantial evidence that the contested provision violated any NLS employee's rights. Therefore, granting reinstatement and backpay bears no rational relationship to the Act, and it is error. Further, 29 U.S.C. § 160(c) prevents, as here, reinstatement and backpay when an individual was discharged for cause.[8] Dupuy was discharged for cause and Dupuy was not engaged in protected activity. Assuming *arguendo* the "remedy" rule is upheld, charging party is not entitled to relief based upon the post *NLS* ALJ Decision change in the law, and the inordinate delay in the Board issuing its decision.

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[8] Even in cases involving a finding of union or concerted activity, reinstatement and backpay has been denied. *See, e.g., NLRB v. Commonwealth Foods, Inc.*, 506 F.2d 1065, 1068 (4th Cir. 1974) (employees engaged in theft from employer); *NLRB v. Breitling*, 378 F.2d 663, 664 (10th Cir. 1967) (employee confessed to stealing from employer; *NLRB v. Big Three Welding Equipment Co.*, 359 F.2d 77 (5th Cir. 1966) (reinstating employee guilty of theft in small company does not serve purpose of Act).

CONCLUSION

For the above reasons, the petition should be allowed.

Respectfully submitted,

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NORTHEASTERN LAND SERVICES, LTD. d/b/a THE NLS GROUP, Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner.

No. 08-1878

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

560 F.3d 36; 2009 U.S. App. LEXIS 5267; 185 L.R.R.M. 3390; 157 Lab. Cas. (CCH) P11,196

March 13, 2009, Decided

PRIOR HISTORY:

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD. Northeastern Land Servs., 2008 NLRB LEXIS 196 (June 27, 2008)

COUNSEL: Richard D. Wayne with whom Hinckley, Allen & Snyder LLP was on brief for petitioner.

Ruth E. Burdick, Attorney, with whom Ronald Meisburg, General Counsel, John E. Higgins, Jr., Deputy General Counsel, John H. Ferguson, Associate General Counsel, Linda Dreeben, Deputy Associate General Counsel, Meredith Jason, Supervising Attorney, and Milakshmi V. Rajapakse, National Labor Relations Board, were on brief for respondent.

JUDGES: Before Lynch, Chief Judge, Boudin and Lipez, Circuit Judges.

OPINION BY: LYNCH

OPINION

LYNCH, *Chief Judge*. This case provides a cautionary tale for employers about the risk of maintaining and enforcing a broad confidentiality clause. Northeastern Land Services, Ltd. ("NLS") petitions for review of the National Labor Relations Board's finding that it violated section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), by maintaining an overbroad confidentiality provision and by discharging its employee Jamison Dupuy for violating it. *Ne. Land Servs., Ltd.*, 352 N.L.R.B. No. 89, 2008-2009 NLRB Dec. (CCH) ¶ 15,110 (June 27, 2008). The Board has filed a cross-application to enforce the order.

The case also raises an issue of first impression: whether a two-member Board decision complied with the quorum requirement of section 3(b) of the NLRA. We deny the petition and grant the Board's cross-application for enforcement.

I.

Because "the Board is primarily responsible for developing and applying a coherent national labor policy, we accord its decisions considerable deference." *NLRB v. Boston Dist. Council of Carpenters*, 80 F.3d 662, 665 (1st Cir. 1996) (citation omitted). The Board's judgment stands when the choice is "between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera*

Corp. v. NLRB, 340 U.S. 474, 488, 71 S. Ct. 456, 95 L. Ed. 456 (1951). A Board order must be enforced if the Board correctly applied the law and if its factual findings are supported by substantial evidence on the record. 29 U.S.C. § 160(e), (f); *Yesterday's Children, Inc. v. NLRB,* 115 F.3d 36, 44 (1st Cir. 1997). Where, as here, "the board has reached a conclusion opposite of that of the ALJ, our review is slightly less deferential than it would be otherwise." *C.E.K. Indus. Mech. Contractors, Inc. v. NLRB,* 921 F.2d 350, 355 (1st Cir. 1990).

II.

The facts are not in dispute. NLS is a temporary employment agency located in East Providence, Rhode Island which supplies workers to clients in the natural gas and telecommunications industries, but pays its workers directly. Dupuy was employed twice by NLS as a right-of-way agent for the acquisition of land rights by clients, from February to November 2000, and from July to October 2001. Dupuy obtained the 2001 placement by contacting Rick Lopez, a project manager for NLS client El Paso Energy, who had once worked with Dupuy at NLS. Lopez directed Dupuy to contact NLS, which soon placed him with El Paso at its Dracut Expansion Project in Massachusetts.

Before both of Dupuy's placements by NLS, NLS required Dupuy to sign a temporary employment contract which said, in relevant part:

> Employee . . . understands that the terms of this employment, including compensation, are confidential to Employee and the NLS Group. Disclosure of these terms to other parties may constitute grounds for dismissal.

This confidentiality provision is at the heart of this case.

Dupuy complained to NLS about repeated delays in receiving his paycheck. He was particularly concerned because he had to pay for expenses such as his hotel bills up front and later seek reimbursement. After Dupuy tried to negotiate with NLS, and even threatened to quit, Jesse Green, Executive Vice President and Chief Operating Officer of NLS, agreed to call Lopez to see if El Paso would either pay for Dupuy's hotel bill or provide a larger per diem than NLS had offered to help with Dupuy's cash flow problems. Although NLS ultimately billed most of Dupuy's expenses to El Paso, NLS was responsible for reimbursing Dupuy. Green told Dupuy that Lopez would not agree to any alternative arrangements.

In early October 2001, Dupuy raised two additional concerns about his job. The first arose when Dupuy contacted Lopez to tell him that Dupuy's cell phone was not working. Dupuy asked Lopez whether he might be able to work for El Paso through a different employment agency because Dupuy had not been paid in a timely manner by NLS. Lopez refused Dupuy's request and gave Dupuy the contact

information of Norm Winters, an agent of NLS, to resolve the pay issues.

The second concern was the reimbursement for Dupuy's work-related use of his personal computer. Dupuy had initially arranged to receive a $15-per-day reimbursement for computer usage. NLS treated this as a "pass-through" business expense for tax purposes, which did not count as income to the employee, and on which NLS did not pay Social Security taxes. On October 2, however, Dupuy received an email from NLS's coordinator of human resources, Susan Green, which referred to the computer usage reimbursement rate as $12 per day. Dupuy replied that El Paso had authorized, and he had been billing, $15 per day for computer usage; he questioned the $12-per-day rate. Green told Dupuy that NLS's accountants had determined that the computer usage cost should be considered taxable compensation, rather than a pass-through expense billed to El Paso. Green stated that the reclassification of the tax status of the computer usage fee had increased NLS's overhead costs, requiring an offsetting reduction of $3 per day.

Dupuy sent a reply email to Green, copying Lopez, stating, "By copy of this email to Rick Lopez, I am asking El Paso to offset your surcharge and additional tax burden." He said that if he did not receive the offset, "I will no longer be using my computer for this job. El Paso will have to furnish me with a digital camera, and I will no longer be available by email. . . . After today and until the matter has been resolved, my equipment is offline."

On the evening of October 3, he sent an email to everyone working with him on the El Paso project, including Rick Lopez, saying, "Until further notice, my computer is offline and I will not be accepting email. I can still be reached by the contact telephone numbers that you have." Dupuy did not copy any NLS managers on the email. Jesse Green testified that although he tried to contact Dupuy numerous times by paging him, calling his cell phone and leaving messages at his hotel and with other employees, Dupuy did not call him back.

On October 11, 2001, Jesse Green spoke with Dupuy on the phone. Green told Dupuy that NLS had tried to accommodate his requests, but that it seemed that NLS could never make Dupuy happy and, as a result, NLS thought it was best to terminate his employment. Dupuy replied that he would sue NLS for retaliatory discharge, alleging that it fired him because he had threatened to file a complaint against the company with the Massachusetts Attorney General alleging violations of state wage laws.[1] When Dupuy pressed Jesse Green for the reason for his termination, Green replied that NLS had cause to terminate Dupuy's employment, as Dupuy had "not lived up to [his] end of the bargain with [NLS]."

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[1] The alleged violations were NLS's failure to pay Dupuy within six days of the end of the pay period and the deduction of $3.00 from his compensation due to the change in the rate of reimbursement for computer usage.

Jesse Green later testified that his statement regarding Dupuy's "failure to live up to his end of the bargain" was a reference to Dupuy's failure to comply with the confidentiality provision in the temporary employment agreement that required him not to disclose the terms of his employment to outside parties. Green, who had drafted the confidentiality provision, further testified that in making the determination that Dupuy had violated the confidentiality provision by contacting El Paso directly, Green thought it was "inappropriate" for Dupuy to "approach a client with [his] . . . problems [about salary], [because] then we're not providing the services that we contracted to provide."

Dupuy filed an unfair labor practice charge on October 24, 2001, and filed an amended charge on December 17, 2001. The complaint issued January 16, 2002, alleging that NLS violated section 8(a)(1) of the NLRA by maintaining and enforcing an unlawful confidentiality clause in its employment contract that discouraged employees from engaging in protected concerted activities, and by terminating Dupuy's employment on October 11 for violating the terms of that clause.

The ALJ found that although the provision did restrict the employees' right to discuss their terms and conditions of employment with third parties, "there are different gradations in how seriously employees' Section 7 rights are affected." Relying on his reading of Board precedent, the ALJ found that the confidentiality provision did not violate section

8(a)(1), explaining that "because [NLS] did not prohibit discussions of terms and conditions of employment among fellow employees, I find [NLS's] restriction a less serious infringement upon its employees' Section 7 rights." Relying on language from *Desert Palace Inc.*, 336 N.L.R.B. 271 (2001), the ALJ explained that "[i]t is necessary to strike a proper balance between employees' Section 7 rights and an employer's business justifications." Noting the competitive bidding process in NLS's industry, the ALJ found that NLS "had a legitimate and substantial business justification for the rule outweighing the restriction on the employees' Section 7 rights." Dupuy appealed.

On June 27, 2008, the Board, by a two-member panel, reversed the ALJ's decision, determining that, under *Martin Luther Mem'l Home, Inc.* (*Lutheran Heritage*), 343 N.L.R.B. 646 (2004), the confidentiality provision was unlawful because "employees reasonably would construe it to prohibit activity protected by Section 7." The Board explained, "The [confidentiality] provision, by its clear terms, precludes employees from discussing compensation and other terms of employment with 'other parties.' Employees would reasonably understand that language as prohibiting discussions of their compensation with union representatives." The Board determined that the provision was overbroad and therefore in violation of section 8(a)(1), without relying on whether NLS had actually enforced the rule.

As to the termination of Dupuy's employment for violating the rule, the Board held, "Under extant Board precedent, an employer's imposition of discipline pursuant to an unlawfully overbroad . . . rule constitutes a violation of the Act." NLS had conceded that it dismissed Dupuy because he violated the confidentiality provision. The Board concluded that "[NLS]'s termination of Dupuy pursuant to [the confidentiality] provision violated Section 8(a)(1)." In a footnote to the unlawful discharge analysis, the Board explained that one member, Chairman Schaumber:

> [A]grees . . . that application of *Double Eagle Hotel & Casino* dictates a finding that Dupuy's termination violated Sec. 8(a)(1) of the Act. However, he questions the theory that an employer's imposition of discipline pursuant to an unlawfully overbroad rule is necessarily unlawful, such as in situations where the discipline imposed is for a lawful reason albeit under an overly broad, unlawful rule. Nonetheless, he applies precedent for institutional reasons for the purpose of deciding this case.

Ne. Land Servs., 352 N.L.R.B. No. 89 at 3, n.9.

The Board ordered, inter alia, that NLS rescind the provision; that NLS notify its current and former employees under the temporary employment agreement of the decision; that Dupuy be reinstated to his former position or a substantially similar position; that Dupuy be made whole "for any loss of earnings

and other benefits suffered as a result of the unlawful action taken against him"; and that NLS ensure that the references to the unlawful discharge be deleted from NLS's files.

III.

We turn to NLS's challenge to the Board's decision. NLS contends that the decision could not be properly issued because the Board lacked a quorum under section 3 of the NLRA, 29 U.S.C. § 153(b), in that it cannot delegate all of its powers to a two-person panel. On the merits, NLS argues that the Board erred in finding that the confidentiality agreement violated section 7 and in finding that Dupuy's termination violated the NLRA. These arguments fail.

A. *The Quorum Requirement*

The first issue raised is one of statutory interpretation of section 3(b). We owe some deference to the agency's view. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). By statute, the Board consists of five members, who are appointed by the President with the advice and consent of the Senate and serve staggered terms of five years. 29 U.S.C. § 153(a). Section 3(b) of the NLRA states:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself

> exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

29 U.S.C. § 153(b).

Pursuant to that authority, the four members of the Board who held office on December 28, 2007 delegated the Board's powers to a three-member group. When the term of one member of that group expired three days later, a two-member quorum remained.[2]

The Board's delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the

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[2] The Board explained:

> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. *See* Sec. 3(b) of the Act.

Ne. Land Servs., 352 N.L.R.B. No. 89 at 1 n.2

plain text of section 3(b). First, section 3(b) allowed the Board to delegate all of its powers to a three-member group. Second, the statute states that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board." The vacancy, which left the two-member quorum remaining, may not, under the terms of section 3(b), impair the right of the two-member quorum to exercise all powers of the Board. This is consistent with the conclusion of the Office of Legal Counsel of the U.S. Department of Justice which has concluded, "In our view, if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." Quorum Requirements, Memorandum from M. Edward Whelan III, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, (Mar. 4, 2003), *available at* 2003 WL 24166831. Moreover, "[a]ny other general rule would impose an undue burden on the administrative process." *R.R. Yardmasters of Am. v. Harris,* 232 U.S. App. D.C. 171, 721 F.2d 1332, 1343 (D.C. Cir. 1983).

Our conclusion is consistent with that of another circuit. *Photo-Sonics, Inc. v. NLRB,* 678 F.2d 121 (9th Cir. 1982). In *Photo-Sonics,* a three-member panel of the Board heard the case, but before the Board announced its decision, one member of the panel submitted his resignation. The resignation became effective on the same day the decision in the case issued, although all three members concurred in the

decision. The petitioner argued that the decision was unenforceable because "it was not made by a properly constituted three-member panel" because the resigning person, the petitioner argued, could not have participated in the decision. *Id.* at 122. *Photo-Sonics* reasoned that under section 3(b), "Even if [the member who resigned] did not participate [in the decision], a decision by two members of the panel would still be binding," *id.* at 122, and analogized the quorum requirement in section 3(b) to the quorum for the federal courts of appeals. *Photo-Sonics* stated, "[c]ourts have interpreted 'quorum' to mean the 'number of the members of the court as may legally transact judicial business.'" *Id.* (quoting *Tobin v. Ramey,* 206 F.2d 505, 507 (5th Cir. 1953)). The court concluded that the participation of the two-member quorum needed to conduct business was sufficient. *Id.* at 123.

Further, courts have upheld analogous approaches by other administrative agencies. *See Falcon Trading Group, Ltd. v. SEC,* 322 U.S. App. D.C. 181, 102 F.3d 579, 582 (D.C. Cir. 1996) (upholding SEC's promulgation of a new quorum rule to allow it to continue to operate in the face of multiple vacancies); *Hunter v. Nat'l Mediation Bd.,* 754 F.2d 1496, 1498-99 (9th Cir. 1985) (per curiam) (upholding decision by two members of three-member panel of National Mediation Board allowing two-member quorum where almost all of the preliminary work had been performed by one member); *R.R. Yardmasters of Am.,* 721 F.2d at 1340 n.26 (upholding

the National Mediation Board's delegation of its authority to a single member expected to remain in office).

B. *Overbreadth of the Confidentiality Provision*

Section 8 of the NLRA prohibits employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in" section 7 of the NLRA. 29 U.S.C. § 158(a)(1). Section 7 guarantees employees the right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

Section 8(a)(1) has been read to bar employer interference with employees' right to discuss the terms and conditions of their employment with others under section 7 of the NLRA. *See Beth Israel Hosp. v. NLRB,* 437 U.S. 483, 491, 98 S. Ct. 2463, 57 L. Ed. 2d 370 (1978) ("[T]he right of employees to self-organize and bargain collectively established by § 7 . . . necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite."); *Cent. Hardware Co. v. NLRB,* 407 U.S. 539, 543, 92 S. Ct. 2238, 33 L. Ed. 2d 122 (1972) ("[O]rganization rights are not viable in a vacuum; their effectiveness depends in some measure on the

ability of employees to learn the advantages and disadvantages of organization from others.").

An employer violates section 8(a)(1) when it maintains a work rule that "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel,* 326 N.L.R.B. 824, 825 (1998). Under the Board's caselaw, if the rule is "likely to have a chilling effect on Section 7 rights, the Board may conclude that [its] maintenance is an unfair labor practice, even absent evidence of enforcement." *Id.*; *see also Guardsmark, LLC v. NLRB* 374 U.S. App. D.C. 360, 475 F.3d 369, 374-80 (D.C. Cir. 2007) (explaining and applying *Lafayette Park* "mere maintenance" rule).

NLS contends that the confidentiality provision did not violate the NLRA because, as a factual matter, it did not prohibit employees from discussing terms of employment among themselves and, although it was enforced, it was not enforced in the face of union activity. NLS asserts that mere broad wording, without evidence of actual chilling of union activity, is insufficient to violate section 8(a)(1).

NLS then makes a qualitatively different argument: that the Board must engage in a balancing test. Here, NLS contends the Board failed to consider the legitimate justification it had for the confidentiality provision: labor costs were a key component of its bids to clients, and NLS did not want its employees jeopardizing its bids. NLS's arguments, however, are at odds with current Board precedent.

After the ALJ ruling and before the Board rendered its decision here, the Board decided *Lutheran Heritage,* 343 N.L.R.B. 646 (2004). *Lutheran Heritage* clarified the nature of the Board's inquiry and confirmed the Board's prior caselaw that "mere maintenance" of a rule that "would reasonably tend to chill employees in the exercise of their Section 7 rights" is unlawful under Board caselaw, *Lafayette Park,* 326 N.L.R.B. at 825, and that there need not be any evidence of actual chilling of union activity as NLS claims.

In *Lutheran Heritage,* the Board articulated a two-step framework for determining whether an employer's maintenance of a work rule violates section 8(a)(1). First, if the rule *explicitly* restricts section 7 activity, it is unlawful. *Id.* at 646. Second, even if the rule does not explicitly restrict section 7 activity, it is nonetheless unlawful if "(1) employees would reasonably construe the language [of the rule] to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647.

Here, the Board relied on the first prong of the second part of the test. It found that although the NLS rule did not explicitly restrict section 7 activity, employees would reasonably construe the language of the rule to prohibit section 7 activity under *Lutheran Heritage.* The plain language of the confidentiality provision provides: "Disclosure of these terms [of employment] to other parties may constitute grounds

for dismissal." The Board's finding that this language could be fairly read to extend to disclosure of terms of employment to union representatives is supportable. The precise subject matter of the forbidden disclosure – terms of employment, including compensation – went to a prime area of concern under section 7.[3]

The Board's interpretation was consistent with its prior caselaw.[4] *See Cintas Corp.*, 344 N.L.R.B. 943,

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[3] NLS asserts that the confidentiality provision is lawful because the plain text of the provision did not forbid employees from talking to each other or to union organizers. This argument fails to address the Board's *Lutheran Heritage* analysis, which holds that a provision is unlawful if employees would reasonably believe it forbids such communication.

[4] NLS alludes to but does not develop an argument that the Board's result is inconsistent with the prior caselaw, as demonstrated by the ALJ's reading of the caselaw. We set aside NLS's waiver and consider the point. We find no such inconsistency.

In interpreting NLS's provision as a "less serious infringement on its employees' Section 7 rights," the ALJ relied on cases involving more narrowly drafted confidentiality provisions than the one at issue here. *See, e.g., K-Mart,* 330 N.L.R.B. 263 (1999) (prohibition on disclosing "company business and documents" did not by its terms include employee wages or working conditions and made no reference to employee information); *Lafayette Park Hotel,* 326 N.L.R.B. at 826 (rule banning discussion of "hotel-private" information that did not on its face cover employee wage discussion). Furthermore, under *Lafayette Park* and *Lutheran Heritage*'s "mere maintenance" rule, the Board did not need to consider the employer's reasons for the rule. *Cf. Desert Palace, Inc.*, 336 N.L.R.B. 271, 272 (2001), (upholding employer's policy of confidentiality on matters relating to its investigation of an allegation that an employee was dealing drugs). Furthermore, since its 1990 decision in

(Continued on following page)

943 (2005) (finding overbroad a confidentiality provision prohibiting "the release of 'any information' regarding '[the company's] partners' [because it] could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with the Union"), *enforced,* 375 U.S. App. D.C. 371, 482 F.3d 463 (D.C. Cir. 2007).

NLS argues that the Board should have considered that the confidentiality provision was justified by legitimate business reasons, citing *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 65 S. Ct. 982, 89 L. Ed. 1372 (1945). *See id.* at 798 (noting that in section 7 analysis "[o]pportunity to organize and proper discipline are both essential elements in a balanced society"); *see also Tex. Instruments, Inc. v. NLRB,* 637 F.2d 822, 833 (1st Cir. 1981). Nothing in *Republic Aviation* compelled the Board to apply a balancing test here. While the Board could have chosen to structure its rule differently and engage in a balancing analysis, we owe deference to its decision not to do so. Further, as a practical matter, a more narrowly drafted provision would be sufficient to accomplish NLS's goal in maintaining confidentiality in bidding for contracts. *See, e.g., Cintas Corp.,* 482

Kinder Care Learning Ctrs., Inc., 299 N.L.R.B. 1171 (1990), the Board has consistently held that when a rule's plain language restricts employees' ability to communicate their conditions of employment to third parties it violates section 8(a)(1). *Id.* at 1172 (finding ban on "parent communication" unlawful).

F.3d at 470 ("A more narrowly tailored rule that does not interfere with protected employee activity would be sufficient to accomplish the Company's presumed interest in protecting confidential information."). We cannot say the Board's interpretation was unreasonable. Some may think this result unattractive, but the Board's rule is intended to be prophylactic and in any event is subject to deference.

C. *The Termination of Dupuy's Employment*

NLS has conceded that Dupuy was dismissed for violating the confidentiality provision. "[W]here discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule." *Double Eagle Hotel & Casino,* 341 N.L.R.B. 112, 112 n.3 (2004), *enforced,* 414 F.3d 1249 (10th Cir. 2005); *see also Opryland Hotel,* 323 N.L.R.B. 723, 728 (1997). While Chairman Schaumber indicated he might question the rule, he conceded he was bound by the precedent set in *Double Eagle Hotel,* 341 N.L.R.B. 112.[5]

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[5] To attack this principle, NLS cites only an ALJ's decision in *Electronic Data Systems Corp.,* No. 36 CA 7434, 1996 NLRB LEXIS 384, 1996 WL 33321516 (N.L.R.B. Div. of Judges June 11, 1996), where the ALJ did not find an employee's dismissal pursuant to an overbroad confidentiality rule unlawful. The ALJ's unreviewed opinion is not binding on the Board or on this court.

NLS claims that the discharge was lawful, relying on *Wright Line, a Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *enforced,* 662 F.2d 899 (1st Cir. 1981) to argue that NLS can avoid liability if it demonstrates that it would have discharged Dupuy even in the absence of an unlawful reason. NLS contends that it would have terminated Dupuy even in the absence of the confidentiality provision because he was "insubordinate and disruptive." These arguments misconstrue the Board's precedent. It also argues that even if its confidentiality provision was unlawful, Dupuy's dismissal did not violate the act because he was not engaged in union or concerted protected activity.

Wright Line sets forth the test for assessing cases where the dispute turns on employer motive: whether the employer discharged an employee because of the employee's union affiliation, or whether he acted because of some factor unrelated to the employee's union status. 662 F.2d at 901. *Wright Line,* however, does not govern here. Under the Board's precedent, where the Board finds an employer rule is invalid, discharge for violating that rule is invalid. *See Saia Motor Freight Line, Inc.*, 333 N.L.R.B. 784, 785 (2001) ("Because [the employee] was disciplined for violating the [employer]'s unlawful overly broad . . . rule, that discipline itself constitutes a violation of Section 8(a)(3) and (1), without consideration of *Wright Line*'s dual-motivation analysis.").

The Board did not err in not considering that Dupuy would have been discharged in the absence of

a violation of the confidentiality provision. The Board supportably relied on its own precedents to determine that any discharge pursuant to an unlawful rule is itself unlawful. "The fact that one reason for [an employee's] reprimand was lawful in no way diminishes the fact that the other reason was unlawful." *A.T. & S.F. Mem'l Hosps., Inc.*, 234 N.L.R.B. 436, 436 (1978).

We *deny* NLS's petition for review and enter judgment enforcing the order of the Board.

Northeastern Land Services, Ltd. d/b/a The NLS Group *and* Jamison John Dupuy. Case 1-CA-39447

June 27, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On June 27, 2002, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Charging Party and the General Counsel filed exceptions and supporting briefs. The Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

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[1] The Charging Party and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a

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The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by maintaining in its employment contracts an overbroad confidentiality provision and by terminating employee Jamison Dupuy for breaching that confidentiality provision. The judge dismissed the complaint in its entirety. For the reasons set forth below, we reverse the judge's decision and find that the Respondent violated Section 8(a)(1) in both respects alleged.

I. FACTS

The Respondent is a temporary employment agency that supplies labor – including, as relevant here, right-of-way agents who perform various activities related to the acquisition of land rights – to companies in the natural gas pipeline and fiber optic telecommunications industries. Charging Party Jamison Dupuy was employed twice by the Respondent as a right-of-way agent. During the second period of employment, from July to October 2001,[3] the Respondent assigned Dupuy to a project undertaken by Respondent's client, El Paso Energy. At the outset of both employments, the Respondent required Dupuy to sign its temporary employment

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quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] Unless otherwise indicated, all dates herein are in 2001.

agreement. This agreement included the following confidentiality language:[4]

> Employee also understands that the terms of this employment, including compensation, are confidential to Employee and the NLS Group. Disclosure of these terms to other parties may constitute grounds for dismissal.

Dupuy experienced delays in receiving his pay on the El Paso project. These delays caused a particular problem for Dupuy because he had to pay for his lodging expenses up front and was reimbursed later. Dupuy had several conversations about this problem with agents of the Respondent, including Executive Vice President and Chief Operating Officer Jesse Green. During one such conversation, Dupuy told Jesse Green that, if the problem could not be resolved, he would be forced to call El Paso Project Manager Rick Lopez[5] to tell him that he was quitting. Green responded that he would call Lopez. Green subsequently told Dupuy that Lopez would not alter their arrangement relating to Dupuy's lodging expenses.

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[4] The Respondent stipulated that the employment contracts for all of its right-of-way agents contained the same or similar language. In addition, this language was included in the employment letter sent to Dupuy by the Respondent's Coordinator of Human Resources, Susan Green.

[5] The Respondent had previously employed Lopez. Dupuy knew Lopez and, in fact, had secured his employment on the El Paso Project by contacting Lopez directly.

In early October, Dupuy called Lopez. Dupuy told Lopez that he had not been getting paid in a timely manner, and he asked if it might be possible for him to work for El Paso through a different employment agency. Lopez said that would not be possible.

Also in early October, another pay related issue arose for Dupuy. At the outset of his employment on the El Paso project, Dupuy arranged with Lopez to be reimbursed by the Respondent $15 per day for the work-related use of his personal computer. Dupuy notified the Respondent of this arrangement, and for a time the Respondent reimbursed Dupuy $15 per day. On October 2, however, Dupuy received an email from the Respondent's coordinator of human resources, Susan Green, that referred to the computer usage reimbursement rate as $12 per day. Dupuy responded, stating that El Paso had authorized, and he had been receiving, $15 per day for computer usage, and questioning Green's reference to a $12-per-day rate. The substance of Green's reply was that tax-related reasons had increased the cost of the reimbursement, requiring an offsetting reduction of $3 per day. Dupuy responded to Green, and copied Lopez at El Paso, in relevant part as follows:

> By copy of this email to Rick Lopez, I am asking El Paso to offset your surcharge and additional tax burden. Otherwise . . . I will no longer be using my computer for this job . . . , El Paso will have to furnish me with a digital camera, and I will no longer be available by email. . . . After today and until

> the matter has been resolved, my equipment is offline.

On October 11, by the happenstance of crossed telephone lines, Dupuy and Jesse Green found themselves speaking to one another on the phone. According to Green's credited testimony, he told Dupuy that, although the Respondent had done its best to accommodate him, it seemed that the Respondent could never make him happy and, consequently, the Respondent thought it best to terminate his employment. Dupuy answered that the Respondent could not fire him because he had filed a complaint against the Respondent with a State agency.[6] Green replied that the Respondent had cause to terminate Dupuy, as he had "not lived up to [his] end of the bargain with [the Respondent]." In response to a question from the General Counsel, Green confirmed that his statement regarding Dupuy's "failure to live up to his end of the bargain" was a reference to Dupuy's failure to comply with his contractual agreement – i.e., the confidentiality provision in the temporary employment agreement – not to disclose the terms of his employment to outside parties.

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[6] The complaint concerned Dupuy's dispute with the Respondent over his delayed paychecks.

II. JUDGE'S DECISION

The judge dismissed the complaint. First, he found that the confidentiality provision did not violate Section 8(a)(1). Specifically, the judge found that the provision did not prohibit employees from discussing their terms and conditions of employment with one another. He further found that, although the provision *did* restrict the employees' right to discuss their terms and conditions of employment with third party clients, the Respondent proffered a legitimate and substantial business justification[7] that outweighed the restriction on employee rights. Second, the judge concluded that, as the confidentiality provision was not unlawful, the Respondent's termination of Dupuy for violating that provision consequently was not unlawful.

III. ANALYSIS

A. The Confidentiality Provision

In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board articulated the following standard for determining whether an employer's maintenance of a work rule violates Section 8(a)(1). If the rule explicitly restricts Section 7 activity, it is unlawful. Id. at 646. If the rule does not explicitly

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[7] The judge relied on the Respondent's testimony that it is engaged in a very competitive industry, and the wages and reimbursements that it provides to its employees comprise a significant portion of the bids that it submits to potential clients.

restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Id. at 647. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights. Id. at 646.

Applying this standard here, we conclude that the Respondent's confidentiality provision is unlawful because employees reasonably would construe it to prohibit activity protected by Section 7.[8] Specifically, without passing on the judge's finding that the provision does not prohibit interemployee communications, the provision, by its clear terms, precludes employees from discussing compensation and other terms of employment with "other parties." Employees would reasonably understand that language as prohibiting discussions of their compensation with union representatives. See, e.g., *Bigg's Foods*, 347 NLRB 425, 425 fn. 4 (2006); *Cintas Corp.*, 344 NLRB 943, 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007). Accordingly, the confidentiality provision is unlawfully overbroad at least in this respect, in violation of Section 8(a)(1).

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[8] In light of this conclusion, we need not address whether the rule is unlawful under *Lutheran Heritage's* other standards.

B. Termination of Employee Dupuy

Under extant Board precedent, an employer's imposition of discipline pursuant to an unlawfully overbroad policy or rule constitutes a violation of the Act. See, e.g., *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006); *Saia Motor Freight Line*, 333 NLRB 784, 785 (2001); *Opryland Hotel*, 323 NLRB 723 (1997); *A.T. & S.F. Memorial Hospitals*, 234 NLRB 436 (1978); *Miller's Discount Dept. Stores*, 198 NLRB 281 (1972), enfd. 496 F.2d 484 (6th Cir. 1974). As described above, the Respondent's executive vice president, Jesse Green, testified that Dupuy was discharged due to his failure to comply with the confidentiality provision in his employment contract. As we have concluded that the confidentiality provision was unlawfully overbroad, we accordingly find that the Respondent's termination of Dupuy pursuant to that provision violated Section 8(a)(1) of the Act.[9]

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[9] Chairman Schaumber agrees with his colleague that application of *Double Eagle Hotel & Casino* dictates a finding that Dupuy's termination violated Sec. 8(a)(1) of the Act. However, he questions the theory that an employer's imposition of discipline pursuant to an unlawfully overbroad rule is necessarily unlawful, such as in situations where the discipline imposed is for a lawful reason albeit under an overly broad, unlawful rule. Nonetheless, he applies precedent for institutional reasons for the purpose of deciding this case.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent maintained an overbroad confidentiality rule in its employment contracts, we shall order the Respondent to rescind the rule and notify its employees that the rule is no longer in force. Further, having found that the Respondent unlawfully discharged Jamison Dupuy pursuant to the overbroad confidentiality rule, we shall order the Respondent to offer him reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job. We shall also order the Respondent to make him whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful action, in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), along with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also remove from its files all references to the unlawful discharge of Jamison Dupuy and notify him in writing that it has done so.

In addition, because the Respondent's right-of-way agents – and possibly other employees employed under the Respondent's temporary employment agreement – work in widely scattered locations, it is unlikely that a notice posted at the Respondent's Providence, Rhode Island facility would sufficiently

inform those employees about the Board's Order in this case. Accordingly, in addition to our standard notice-posting remedy, we shall also require mailing of the notice. See *Technology Service Solutions*, 334 NLRB 116 (2001) (requiring employer to mail notices to employees who did not regularly report to one of its facilities). Specifically, we shall order the Respondent to mail copies of the notice to all current and former employees employed by the Respondent under its temporary employment agreement (including but not necessarily limited to its right-of-way agents) since July 23, 2001, the date from which the complaint alleged and we have found that the Respondent maintained the overbroad confidentiality provision in its temporary employment agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Northeastern Land Services, Ltd. d/b/a The NLS Group, Providence, Rhode Island, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining in its employment contracts or otherwise, an overbroad confidentiality rule prohibiting employees from disclosing to "other parties" their compensation or other terms of employment.

(b) Discharging or disciplining its employees for violating its unlawfully overbroad confidentiality rule.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the overbroad rule described in paragraph 1(a), and notify employees in writing that this has been done and that the rule is no longer in force.

(b) Within 14 days from the date of this Order, offer Jamison Dupuy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Jamison Dupuy whole for any loss of earnings and other benefits suffered as a result of the unlawful action taken against him, in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Jamison Dupuy, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all

payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Providence, Rhode Island facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Duplicate and mail, at its own expense, copies of the notice to all current and former employees employed by the Respondent under its temporary employment agreement (including but not necessarily limited to its right-of-way agents) since July 23, 2001.

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[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted and Mailed by Order of the National Labor Relations Board" shall read "Posted and Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED AND MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post, mail, and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain in our employment contracts an overbroad confidentiality rule prohibiting employees from disclosing to "other parties" their compensation or other terms of employment.

WE WILL NOT discharge or discipline employees for violating the above-described confidentiality rule.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL rescind the above-described overbroad rule and advise employees in writing that the rule is no longer in force.

WE WILL, within 14 days from the date of the Board's Order, offer Jamison Dupuy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Jamison Dupuy whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Jamison Dupuy, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

NORTHEASTERN LAND SERVICES, LTD.
D/B/A THE NLS GROUP

Elizabeth Vorro, Esq., for the General Counsel.

Richard Wayne, Esq. (Hinckley, Allen & Snyder), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on May 8, 2002 in Providence, Rhode Island. The complaint herein, which issued on January 16, 2002 and was based upon an unfair labor practice charge and an amended charge that were filed on October 24 and December 17, 2001[1] by Jamison John Dupuy, an individual, alleges that Northeastern Land Services, Ltd., d/b/a The NLS Group (the Respondent), violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing an unlawful confidentiality clause in his employment contract, and by terminating him on October 11 for violating the terms of that clause, and to discourage employees from engaging in protected concerted activities.

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[1] Unless indicated otherwise, all dates referred to herein relate to the year 2001.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE FACTS

The Respondent is a temporary employment agency that supplies labor primarily to gas pipeline and fibre optic companies. The work of the employees involved generally relates to rights of way for the contracting company. Dupuy was hired by the Respondent as a right-of-way agent to perform services for Duke Energy in February 2000 and El Paso Energy in July. The usual work of right-of-way agents such as Dupuy was to perform title research to determine who owns the land, perform title abstracts, survey permitting and to negotiate for land rights, whether easements or fee properties. The normal situation wherein an energy company would need such employees, and obtain them by calling the Respondent or a competitor, would be if it was planning a gas pipeline and had to purchase land or easements. The right of way agents perform the legal work and, to a lesser extent, the leg work. These are transitory jobs: "We go where the projects are."

Dupuy was employed by the Respondent on two different occasions; the first period was from February 2000 to November 2000. The second period was from about July 23 to October 11. It should be

noted that there was a substantial amount of testimony regarding the difficulty that the parties experienced in having a portion of Dupuy's salary direct deposited into one of his bank accounts. Although the cause of this difficulty is unclear, it is clear that the Respondent did not purposely misdirect his direct deposits to punish him for engaging in protected concerted activities. Therefore there will be discussion of this issue only when it leads into a relevant issue.

Dupuy testified that in this field, employment is usual obtained by word of mouth. Somebody told him of the Respondent and he called and was hired to work on a project for Duke Energy in Tennessee and Virginia with one other employee of Respondent, Gene Teague. The work involved assisting in obtaining permits from the counties involved and acquiring temporary space along the roadways for the pipeline. He received a letter dated February 14, 2000 from Susan Green, the Respondent's coordinator of human resources, setting forth the terms of his employment. In addition to a salary of $200 a day and $85 per diem and mileage, it sets forth the medical and dental coverage. Near the end of the letter it states:

> Employee understands that the Employee will have direct access to and contact with NLS' various clients as Employee performs services hereunder and Employee agrees to keep all information obtained or utilized in the course of performing its services strictly

> confidential. Furthermore, Employee agrees not to solicit work or accept assignments from any of NLS' clients directly while engaged in services hereunder, or for a period of six (6) months after the termination of this agreement. *Employee also understands that the terms of this employment, including compensation, are confidential to Employee and the NLS Group. Disclosure of these terms to other parties may constitute grounds for dismissal.* [Emphasis added.]

There were a number of documents that Dupuy received with this letter. A Temporary Employment Agreement listed remuneration and medical and dental benefits as discussed above, and insurance obligations of the employee. In addition, this Agreement repeated the confidentiality agreement, verbatim, as set forth above in Green's letter. Dupuy made a few corrections to this Agreement, most notably regarding the insurance requirements, and mailed it back to the Respondent. Shortly thereafter, he received a call from Jessie Green, the Respondent's executive vice president and chief operating officer. After discussing these issues, Green acceded to Dupuy's insurance demands and sent him a new temporary employment agreement which he signed. Dupuy also completed a direct deposit form and returned that to the Respondent as well. In November 2000, at about the time that the job was completed, he received a call from someone he knew at Duke Energy telling him that they had another job coming up, and it would involve supervising five to

seven employees, but they couldn't pay him any more than he was then receiving. When Dupuy asked why, he said that they were already paying the Respondent supervisor's wages for his and Teague's services. Dupuy the left the area and went out West where he worked as an independent contractor.

In about June, Dupuy returned to Massachusetts and called Teague, who told him that he was working on a pipeline job in Massachusetts. Dupuy then called Rick Lopez, who had been an employee of the Respondent employed at El Paso Energy, but had become an employee of El Paso. Lopez told him that he did not yet have a completed budget for the new job, but told Dupuy to call Susan Green and ask about working at that job. He called her and she told him that as soon as she heard from Lopez, she would call him. He began work on the El Paso Energy job, the Dracut Expansion Project, on July 23. On that day he signed another Temporary Employment Agreement, again setting forth the terms of his agreement with the Respondent and containing the same confidentiality agreement as he executed the prior year.

Between that date and mid-September, Dupuy was having trouble with the direct deposit of his wages, and had a number of telephone conversations with Ann Ingham of the Respondent about it. In mid September he spoke to Susan Green and told her that the direct deposit difficulty was causing him a cash flow problem. During his employment with the Respondent the prior year he was receiving a flat per

diem of $85 a day, but the hotels there only cost about $600 a month. In Massachusetts, the hotels cost $85 a day. He asked if the Respondent would pay the hotel bill directly, rather than later reimbursing him for the cost. He also asked if it was possible for the Respondent to have "a per diem arrangement" and she said that he should call Jessie Green about that. Shortly thereafter, he received a call from Jessie Green and they discussed the direct deposit problem that they were having, and the possible causes. Dupuy mentioned his cash flow problem caused by the fact that he was paying his hotel bill directly, but not receiving his pay in a timely fashion. He asked if the Respondent could pay the hotel directly and Green said that he couldn't do that. Dupuy then suggested that the Respondent combine the $84 and $33 a day that he was receiving for lodging and meals and give him a per diem of the same amount and Green said that he could not do that. Dupuy then said: "If I can't get paid on time you're going to leave me with no choice but to call Rick Lopez and tell him I'm going to quit because I am not getting paid on time." Green then said that he would call Lopez to see what they could do to ease his difficulty. About three or four days later Green called Dupuy and told him that he had spoken to Lopez and that they would not change his per diem, nor would they pay his hotel bill directly.

Green testified that he received a call from Dupuy who was upset about the difficulty with the direct deposit of his checks; Green told him that it

was a problem that they had been unable to resolve, but they were working to correct the situation. Dupuy then brought up his per diem and whether the Respondent would change its method of reimbursing him. Green told him that the Respondent's contract was very specific about that. Dupuy said that he used a bank debit card, which means that his payments come out of his account immediately, while the other employers use a credit card, which gives them some time to pay. Green "might have" suggested that Dupuy obtain a credit card. Dupuy requested a per diem of $140 a day and Green said that he would submit this request to the client and ask them if they would be willing to change their contract to accommodate him, which he did, but El Paso refused to do so. Green called Dupuy about a day later and told him of their response.

On October 6 Dupuy called Lopez and told him that his cell phone was not working. During this telephone call, he told Lopez that he was not being paid on time, and he asked Lopez if it would be possible for him to work through another service company. Lopez said that he couldn't do that, but he thought that Dupuy should call Norm Winters of the Respondent to try to straighten out the payroll situation. A day or two later, Dupuy called Winters and told him that he had spoken to Lopez about not being paid on time and that his cell phone was not working. Winters asked him if he told Lopez that he was not being paid on time, and Dupuy said that he did and Winters was upset that he had spoken to

Lopez about the pay issue. He told Dupuy that he should call the cellphone company about the phone and Ingham about the direct deposit problem. Dupuy called the cell phone company, but could not straighten it out because he did not have the account number. He called Ingham on the morning of October 9 and told her of both problems, and she said that she would look into it. Later that day, when he spoke to her again, she said that she was too busy to check on his direct deposit, and Dupuy said that the company was in violation of Massachusetts law which requires that employees be paid within 6 days of the end of the pay period and that if he wasn't paid by the next day, he would file a complaint with the Massachusetts Attorney General's office. The money was posted to his account the following day.

Dupuy testified that at a "kick off meeting" for El Paso in about late July he determined that there were some errors in their documents. He called Lopez and told him of the errors. Lopez asked Dupuy to make the changes, and Dupuy said that he didn't mind making the changes, but he would like to be paid for the use of his computer. Lopez said that would not be a problem and in about mid-August, Lopez called him and told him that he and Teague would be reimbursed $15 a day for the use of their computers and digital cameras. Dupuy then called Susan Green and told her what Lopez said, and asked her where to put the charge on the Respondent's time sheet, and she told him what to do, and from that date until about October 1, Respondent reimbursed

him $15 a day for the use of his computer. On October 2, Dupuy received an e-mail from Susan Green about some changes in the Respondent's payroll, including reducing the computer allowance to $12 a day. Later that morning Dupuy sent an e-mail to Susan Green asking why the change from $15 to $12 a day. On the following morning she responded that the rate was dropped to $12 a day for IRS and tax reasons. A few hours later Dupuy, as a protest to the $3.00 reduction in his computer allowance, responded by e-mail to Susan Green, with a copy to Lopez, objecting to the change and stating, inter alia:

> By copy of this email to Rick Lopez, I am asking El Paso to offset your surcharge and additional tax burden. Otherwise, like Dennis Moreau, I will no longer be using my computer for this job and Dal Beck will have to make all the necessary document corrections, El Paso will have to furnish me with a digital camera, and I will no longer be available by email.
>
> After today and until the matter has been resolved, my equipment is offline.

Late in the evening of October 3, Dupuy e-mailed all the people on his project,[2] and Lopez, stating:

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[2] An example of the general tenor of Dupuy's testimony is the following from his cross examination on this point:

> Q. Well, in regard to this memo, was there any reason why you excluded people from the NLS office in Providence?

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"Until further notice, my computer is offline and I will not be accepting email. I can still be reached by the contact telephone numbers that you have." Dupuy testified that on Thursday, October 4, or Friday, October 5, Teague told him that Jessie Green was trying to get in touch with him, and that he should call him by 4, but if he could not get in touch with him by then, to call him on Tuesday, as he would be away for the holiday weekend. He testified further, that he did not call Green at that time for a number of reasons: it was after 4 that he got the message from Teague, he was having cell phone problems and he didn't want to spend his money to call Green. On the afternoon of October 11, Ingham faxed Dupuy a handwritten payroll statement which indicates that he was paid $144 for 12 days' use of his computer. Later that day Dupuy faxed Ingham copies of laws of the State of Massachusetts stating that by reducing his computer allowance and not making his direct deposits in a timely manner, the Respondent was violating the laws of the State of Massachusetts.

Dupuy testified that on October 11, at about 6 p.m. he attempted to call a landowner whom he was scheduled to meet with and, as a result of crossed telephone lines, he heard Jessie Green's voice on the phone. They recognized each other's voice and Green told him, "Jamison, we tried our best to accommodate

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A. When you use the word "exclude", do you mean – why didn't I include them?

you, but we're going to have to let you go." Dupuy said, "I'm going to have to sue you" and Green said, "We're still going to let you go." Green then mentioned something about Dupuy being rude and there was some back and forth about Dupuy suing the Respondent and Green said that they had cause to fire him. When Dupuy asked what cause, Green said that he signed an employment contract that says that he was not to discuss his wages with other people and he had an e-mail that Dupuy sent discussing his wages with other people. Dupuy ended the conversation by telling Green that he was still going to sue him.

Green testified that beginning on about October 2 he called Dupuy and left messages on his voice mail, with the hotel he was staying at and with other employees on the project for Dupuy to call him back. The first time that he heard from Dupuy was on October 11 when he answered his cell phone, Dupuy was on the other end asking to speak to a woman. When both figured out that they were speaking to each other, Green said that he had been trying to reach him, that the Respondent had been trying to accommodate him in his various requests, but they could never make him happy, and the only way that they could make him happy was by severing their relationship and he was terminating him. Dupuy responded that they couldn't fire him because he filed a complaint against the company with the State of Massachusetts. Green told Dupuy that he was firing him because he had not lived up to his bargain with

the company. On cross-examination, Green testified that his attempts to call Dupuy since about October 2 were to tell him that he was being fired:

> Q. Now you – you said that you told him that you were – that he had not lived up to his end of the bargain, am I getting that right?
>
> A. Yes.
>
> Q. And was that a reference to his agreement in the contract that he would not disclose the terms of his employment to outside parties?
>
> A. Yes.

In addition to the confidentiality agreements contained in Dupuy's Temporary Employment Agreements and Susan Green's February 14, 2000 preliminary letter to Dupuy, he also signed an eight paragraph Confidentiality Agreement with the Respondent on February 16, 2000.[3] This Agreement contains eight paragraphs and binds the employee to hold in strict confidence all information obtained by working for the energy company. This Confidentiality Agreement does not refer to the employee's wages or other conditions of employment.

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[3] It is not clear if Dupuy signed an additional Confidentiality Agreement for his second term of employment with the Respondent in 2001.

Jessie Green testified about the confidentiality agreement involved herein, the one contained in Susan Green's February 14, 2000 letter and in his two Temporary Employment Agreements. He authored this provision and it was not meant to prohibit employees from discussing their terms and conditions of employment among themselves. He has overheard Respondent's employees discussing their wages and reimbursements among themselves and he has never disciplined employees for such actions. Green testified that the Respondent is engaged in a very competitive industry and its payments to its employees represents a substantial part of its bidding for contracts. The confidentiality agreement was meant to prevent its employees from dealing directly with its clients regarding terms of their employment. In answer to a question from me as to what Dupuy had done to violate the terms of the confidentiality agreement, Green testified:

> [W]e have very specific billing requirements from our client of what we can bill for and what we can't bill for and when individuals try to circumvent those contractual obligations that we have, of course it creates problems for us and not only that but our client hires us because they don't want these people as employees and when our employees approach our client with their – their problems, then we're not providing the services that we contracted to provide.

He testified further that the Respondent is similar to a glorified Kelly Services. If he contracted with Kelly

Services to provide him with employees, he would find it inappropriate for a Kelly employee to approach him and say that she feels that she needs a raise, and if that happened, he would not use Kelly the next time that he needed employees.

III. ANALYSIS

I found Jessie Green to be a totally credible and believable witness herein, and Dupuy to be less credible. Green answered each question briefly, clearly and directly even when it was not helpful, or was potentially harmful, to the Respondent's case. On the other hand it appeared to me that Dupuy was tailoring his testimony to best assist his case. As stated in footnote 2, above, his answers were rarely brief and direct, and he often explained or expanded on an answer even when not asked to do so. As an example of his lack of candor, in order to explain why he did not return Jessie Green's calls, he testified that he believes that he did not learn of the call until after 4 on October 4 or 5, and the message was that if he could not call by 4, then to call on Tuesday. However, the Tuesday in question was October 9 and the evidence establishes that Dupuy made no attempt to return Green's call even then, and when he finally did contact Green on October 11 it was by mistake, when their telephone lines got crossed. For all these reasons, I credit the testimony of Green over that of Dupuy.

The initial question is whether the clause in the temporary employment agreement is overly broad and in violation of Section 8(a)(1) of the Act. The clause states:

> Employee understands that Employee will have access to and contact with NLS' various clients as Employee performs services hereunder and Employee agrees to keep all information obtained or utilized in the course of performing its services strictly confidential. Furthermore, Employee agrees not to solicit work or accept assignments from any of NLS' clients directly while engaged in services hereunder, or for a period of six (6) months after the termination of this agreement. *Employee also understands that the terms of this employment, including compensation, are confidential to Employee and the NLS Group. Disclosure of these terms to other parties may constitute grounds for dismissal.*

It is only the final two sentences above that are alleged to be unlawful. One of the lead cases in this area is *Lafayette Park Hotel*, 326 NLRB 824 (1998) wherein a number of rules contained in the employer's handbook were alleged to be unlawful. The one closest to the instant matter provided that the following was unacceptable: "Divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information." The Board, in finding that the provision did not violate the Act, stated that the initial appropriate inquiry in cases such as this is whether

the rule would reasonably tend to chill employees in the exercise of their Section 7 rights:

> We do not believe that employees would reasonably read this rule as prohibiting discussions of wages and working conditions among employees or with a union. Clearly, businesses have a substantial and legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information. Although the term hotel-private is not defined in the rule, employees in our view reasonably would understand that the rule is designed to protect that interest rather than to prohibit the discussion of their wages. Thus, just as employees would not reasonably construe the rule as precluding them from disclosing their wage information in the normal course of events to banks, credit agencies and similar entities, they also would not reasonably construe the rule as precluding them from discussing their wage information with other employees.

In *Super K-Mart*, 330 NLRB 263 (1999), the rule in question barred the disclosure of "company business and documents." The Board stated that this provision was similar to the restriction in *Lafayette Park*, supra, in that it did not prohibit employees from discussing wages and working conditions. The Board stated: " . . . employees reasonably would understand from the language of the Respondent's confidentiality provision that it is designed to protect

the Respondent's legitimate interest in maintaining the confidentiality of its private business information, not to prohibit discussion of wages or working conditions." The Board found that the provision did not violate the Act because it " . . . reasonably is addressed to protecting the Respondent's legitimate confidentiality interest and does not implicate employee Section 7 rights. . . ." In *Jeanette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976), the court found that once it is determined that an employer's conduct adversely affects employees' protected rights, the burden is then on the employer to establish "legitimate and substantial business justification" for its conduct.

In a more recent case, *Caesar's Palace*, 336 NLRB 271 (2001), based upon the contents of an anonymous letter alleging that illegal activity including drug dealing, stolen company property and threats to the lives of employees was occurring at the employer's premise, the employer began an investigation of the allegations and notified all employees questioned that they were prohibited from discussing the investigation with fellow employees. The employer fired two employees for violating this rule. The Board agreed with the judge that the employees had a Section 7 right to discuss discipline and disciplinary investigations of other employees and that this rule adversely affected that right, but stated:

> It does not follow however that the Respondent's rule is unlawful and cannot be

> enforced. The issue is whether the interests of the Respondent's employees in discussing this aspect of their terms and conditions of employment outweighs the Respondent's asserted legitimate and substantial business justifications.

The Board stated that it is necessary to strike a proper balance between employees' Section 7 rights and an employer's business justifications. Because of the alleged illegal drug activity, the threats of violence and alleged management cover-up in the work place, the Board found that the rule sought to ensure that witnesses were not put in danger, that evidence was not destroyed and testimony was not fabricated. The Board found that this was a substantial and legitimate business justification for the rule and outweighed the rules' infringement on employees' Section 7 rights. However, in *Phoenix Transit System*, 337 NLRB 510 (2002), the issue was the legality of a rule prohibiting the company's employees from discussing among themselves sexual harassment complaints against a supervisor. A year and a half later, an employee and union officer wrote articles in the union newspaper about the sexual harassment allegations and was fired for violating the rule prohibiting discussion of the issue. In finding that the rule against discussing the sexual harassment allegations and the discharge that resulted from the violation of the rule violated the Act, the Board distinguished *Caesar's Palace*, supra, stating that the rule prohibited employees from speaking among themselves and outsiders, and that the company had

failed to establish a legitimate and substantial justification for the rule. In *Waco, Inc.*, 273 NLRB 746 at 748 (1984), the Board, in deciding that by admonishing its employees not to discuss their wages among themselves the employer violated Section 8(a)(1) of the Act, stated:

> In assessing the lawfulness of the Respondent's rule, we are not concerned with the subjective impact of the rule on particular employees. Instead, we must determine whether the rule reasonably tended to coerce employees in the exercise of their Section 7 rights, and, if so, whether the employees' Section 7 rights are outweighed by any legitimate and substantial business justification for the rule. [Footnotes omitted.]

A reading of the rule herein convinces me that it restricted employees from discussing their terms of employment, including compensation, with anybody other than those employed by the Respondent. It does not restrict employees from discussing their terms of employment with other of Respondent's employees. I say this because the provision says that the terms of their employment are confidential to "Employee and the NLS Group" and that disclosure "to other parties" may be grounds for dismissal. In addition, Green testified that he has observed Respondent's employees discussing their wages and reimbursements among themselves and has not taken any action against them.

The initial question is whether restricting its employees' right to discuss the terms of their employment, including compensation, reasonably tended to coerce them in the exercise of their Section 7 rights. As counsel for the Respondent stresses in his brief, there was no restriction of the employees' ability to discuss, amongst themselves, their conditions of employment, including compensation. Whereas discussions with fellow employees constitutes the principal and most effective means of protected concerted activities, it is not the only means. Employees have a protected right (with some limits) to discuss their conditions of employment with outsiders as well. For example, in *Kinder Care Learning Centers, Inc.*, 299 NLRB 1171 (1990), the Board found that a prohibition on discussing terms and conditions of employment with parents of the children at the school violated the Act, and in *Handicabs, Inc.*, 318 NLRB 890 (1995), the Board similarly found a violation in a prohibition of discussing complaints or employment problems with its clients, who were "vulnerable adults", senior and disabled persons. The reason is simply that the Board has long found such communications with third parties (as long as they aren't disloyal, reckless or maliciously untrue) to be protected and therefore an employer cannot prohibit such communications without a sufficient reason. I therefore find that the Respondent's rule reasonably tended to coerce its employees in the exercise of their Section 7 rights. However, I find that there are different gradations in how seriously employees' Section 7 rights are affected

by an employer's actions and because the Respondent did not prohibit discussions of terms and conditions of employment among fellow employees, I find the Respondent's restriction a less serious infringement upon its employees' Section 7 rights. The final issue therefore is whether the Respondent had a legitimate and substantial business justification for prohibiting its employees from discussing the terms of their employment, including compensation, with individuals who were not employed by the Respondent, and whether this right outweighed the restriction on the employees' Section 7 rights.

Green testified that the rule was instituted because of the competitive nature of the industry and that the wages and reimbursements to its employees are a substantial part of its bidding for contracts. In *International Business Machines Corp.*, 265 NLRB 638 (1982), the Board found that even though the employer's policy of classifying its wage information "muzzled" its employees by denying them this information to disseminate, thereby adversely affecting their Section 7 rights, it did not violate the Act. The employer did not bar its employees from compiling their own wage information, nor did it prohibit its employees from discussing their wages. The administrative law judge found that the employer operated this secret or "closed salary" basis for business and competitive considerations. He stated further:

> The General Counsel attempts to impugn these objectives, but it is unnecessary to answer each point specifically. It should be

> sufficient to say that the Board may not substitute its business judgment for that of Respondent, merely because it may be arguable that another approach is equally sound. On the other hand, a specious argument may be subject to attack if, by reason of other evidence, Respondent's alleged justification is patently false.

Based upon all of the facts herein, and especially the fact that the rule in question does not prohibit the Respondent's employees from discussing their terms of employment among themselves, I find that the Respondent had a legitimate and substantial business justification for the rule outweighing the restriction on the employees' Section 7 rights. In common with *Lafayette Park*, supra, the Respondent had " . . . a substantial and legitimate interest in maintaining the confidentiality of private information", in this situation, the compensation and reimbursements that it provided to its employees who were employed by its clients. In addition, even though the business justification for the rule is not as strong as in *Caesar's Palace*, supra, in striking a balance between it and the minor infringement of its employees' Section 7 rights, the Respondent's business justification prevails herein. I therefore recommend that the allegation that the confidentiality clause violates Section 8(a)(1) of the Act be dismissed and that the allegation that Dupuy was terminated unlawfully also be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Northeastern Land Services, Ltd., d/b/a The NLS Group, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent did not violate Section 8(a)(1) of the Act by maintaining and enforcing its confidentiality rule or by terminating Jamison Dupuy, as alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

United States Court of Appeals
For the First Circuit

No. 08-1878

NORTHEASTERN LAND SERVICES, LTD,
d/b/a The NLS Group

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

Before

Lynch, *Chief Judge,*
Torruella, Boudin,
Lipez and Howard,
Circuit Judges.

ORDER OF COURT

Entered: **May 20, 2009**

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered

that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

/s/ Richard Cushing Donovan, Clerk.

cc:
Ruth Burdick
Linda J. Dreeben
Jason Meredith
Rosemary Pye
Milakshmi V. Rajapakse
Richard D. Wayne

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAUREL BAYE HEALTHCARE OF LAKE LANIER, INC.	)	Nos. 08-1162
Petitioner/Cross-Respondent	)	08-1214
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1996,	)	
Intervenor	)	

UNOPPOSED MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO STAY THE MANDATE

(Filed Jul. 8, 2009)

To the Honorable, the Judges of the United States Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board ("the Board"), by its Deputy Associate General Counsel, respectfully moves this Court pursuant to Rule 41(d)(2) of the Federal Rules of Appellate Procedure and Circuit Rule 41(a)(2) to stay the mandate for 90 days, pending consideration by the Solicitor General and the Board whether to the file a petition for a writ

of certiorari in the Supreme Court. By operation of Rule 41(d)(2)(B), such a stay would, if the Board files such a petition and so notifies this Court, remain in effect until the Supreme Court's final disposition of the case. In support of its motion, the Board shows as follows:

1. The Board order subject to review in this case was issued by the only two Board members who remain in office, acting as a two-member quorum.

2. On May 1, 2009, a panel of this Court (Chief Judge Sentelle, Circuit Judge Tatel, Senior Circuit Judge Williams) issued its decision, which is reported at 564 F.3d 469. The panel interpreted Section 3(b) of the National Labor Relations Act ("the NLRA"), which provides in pertinent part as follows:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. . . . [29 U.S.C. § 153(b).]

The panel held that under the plain meaning of Section 3(b), an order issued by two members of the Board is beyond the Board's lawful authority if they are the only sitting members of the Board, even if they are acting as a two-member quorum of a

three-member group to whom the Board has delegated all of its powers, because "the Board's ability to legally transact business exists only when three or more members are on the Board." The panel "order[ed] that the decision of the NLRB be vacated, and the case remanded for further proceedings before the Board at such time as it may once again consist of sufficient members to constitute a quorum."

3. The Board and the Intervenor filed timely petitions for rehearing and rehearing en banc, which the Court denied on July 1, 2009.

4. The government is reviewing a petition for certiorari filed in *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009) ("*New Process Steel*"), *petition for cert. filed*, 77 U.S.L.W. 3670 (U.S. May 27, 2009) (No. 08-1457), in which the Seventh Circuit reached a conclusion directly contrary to that of the Court in this case. The government's response currently is due on July 27, 2009. Now that the Court has denied rehearing here, that review will involve consideration of whether the government should petition for certiorari in this case.

5. Pursuant to FRAP 41(d)(2)(A), a stay may be granted if "the certiorari petition would present a substantial question," and there is "good cause for a stay." *See also* Circuit Rule 41(a)(2) (motion for stay must set forth "facts showing good cause for the relief sought"); *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1128 (D.C. Cir. 1980 (Court "obliged" to grant motion for stay because "we have examined the

petitions for certiorari and find that the issues they tender are substantial; resultantly, we must conclude that there exists good cause to justify staying the mandate pending disposition of the petitions").

6. This Court's holding that a two-member quorum of a three-member group to whom the Board has delegated all of its powers lacks authority to issue is in conflict with those of three other circuits. *New Process Steel*, above; *Northeastern Land Servs., v. NLRB*, 560 F.3d 36 (1st Cir. 2009) ("*Northeastern*"), *reh'g denied* (May 20, 2009); *Snell Island SNF LLC v. NLRB*, ___ F.3d ___, 2009 WL 1676116 (2d Cir. June 17, 2009). Specifically, the Court's construction of the plain meaning of Section 3(b) of the NLRA is in conflict with decisions of the Seventh and First Circuits. *See New Process Steel*, 564 F.3d at 845 ("As the NLRB delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy. This indeed is the plain meaning of the text."); *Northeastern*, 560 F.3d at 41 ("the Board's delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b)").

The certiorari petition, if filed, would present an issue that is important and recurring in the administration of the NLRA – whether the National Labor Relations Board can administer the NLRA, including issuing decisions in unfair labor practice cases – with only two sitting members, as it has been

doing since January 1, 2008. Since that time, the Board has issued over 300 published decisions in unfair labor practice and representation cases, as well as numerous unpublished orders, and approximately 100 cases are pending in the courts of appeals.

The split in the circuits over what this court characterized as a "close question," 564 F.3d at 476, coupled with the importance of the issue, create a significant likelihood that the Supreme Court would grant the petition. Indeed, in arguing against the necessity for *en banc* consideration, Laurel Baye opined that "it seems almost certain that the Supreme Court will grant certiorari" if the government seeks review. And with due respect to the opinion of this Court, the Board submits that the 3-1 split in its favor among the courts of appeals objectively establishes at least a reasonable possibility that this Court's decision would be reversed.

7. There is good cause for this Court to issue a stay of mandate, apart from the substantiality of the petition. The authority of the two-member Board has been identified as an issue in 30 cases now in this Court, including this one.[1] If certiorari is granted either in *New Process* or in this case, the Supreme Court's decision will have a direct impact on those

---

[1] This Court has placed in abeyance 25 cases arising from 2-Member Board decisions, in many instances acting *sua sponte*. In addition, parties in four recently filed cases that have not been placed in abeyance have filed motions in which they challenge the authority of the two-member Board.

proceedings and this Court's review of those Board orders. A stay of mandate in this case will maintain the status quo in those cases while the government's review of the two cases is ongoing, and thereby conserve resources of the Court and the parties and expedite relief to the affected parties in cases that have already been substantially delayed, should the Supreme Court grant a petition for certiorari and reverse the judgment of this Court.

8. Counsel for the petitioner and the intervenor each state that they do not oppose this motion.

WHEREFORE, the Board respectfully requests that the Court stay its issuance of mandate for 90 days.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, D.C.
(202) 273-2960

Dated at Washington, D.C.
this 8th day of July, 2009

NORTHEASTERN LAND SERVICES, LTD.

One Office Parkway
East Providence, RI 02914
Telephone (401) 435-4050

NLS [Illegible] 1115-224
Client – El Paso Energy/
Various

TEMPORARY EMPLOYMENT AGREEMENT

THIS AGREEMENT made 2/13/2000 between Northeastern Land Services, Ltd. of East Providence, Rhode Island ("Employer") and Jamison John Dupuy of P.O. Box 6031, Metairie, LA 70002 ("Employee").

Employer and Employee agree that the terms and conditions of this agreement are as follows:

Employee will work exclusively for The NLS Group while on assignment under this contract.

Employee is hired to perform the following services for the duration of this agreement:

Senior Agent 1

Employer agrees to pay the employee in accordance with the following schedule:

(1) Salary: (A) $200/day for days worked; 6 day work week

(2) Salary: (B) Guaranteed minimum salary of $155 per week for weeks that you perform any work.

(3) Food: N/A

(4) Lodging Allowance: N/A

(5) Per Diem: $85/day (7 days if 6 worked)

(6) Travel Allowance: N/A

(7) Mileage Allowance: $.32/mile

(8) Miscellaneous Expenses: Out-of-pocket, if receipted & pre-approved; not to include office supplies.

(9) Employee shall be entitled to 2 travel day(s) to reach the job site.

The salary, living allowance, and expenses shall be paid semi-monthly. Checks will be mailed or direct deposited to the Employee on the fifth (5th) and the twentieth (20th) of each month.

Employer shall withhold from Employee's salary all legally required taxes. State income taxes shall be withheld in accordance with the laws and tax rate schedule in force for the State of TX.

Employee is required to carry auto liability insurance in the amount of at least $25,000/ $50,000 Bodily Injury and $10,000 Property Damage. For those states using single limits, $100,000 combined single limit will suffice. Employee shall furnish a Certificate of such insurance to Employer prior to the commencement date of employment.

Employer shall provide the Employee with a choice of either Individual or Family Plan Health and Hospitalization Insurance for which the Employer shall contribute the sum of $170.00 per month. The cost to the Employee shall be the balance of the cost of the plan elected, based on

the current rates charged by The Guardian Life Insurance Company then in effect, which sum shall be withheld from the Employee's payroll check semi-monthly on a pre tax basis, if so elected. Said insurance coverage shall become effective as of 4/1/2000. If the cost of insurance premiums are increased by the carrier, any such increase shall be passed along to the Employee.

Employee understands that Employee will have direct access to and contact with NLS' various clients as Employee performs services hereunder and Employee agrees to keep all information obtained or utilized in the course of performing its services strictly confidential. Furthermore, Employee agrees not to solicit work or accept assignments from any of NLS' clients that Employee has been assigned to directly while engaged in services hereunder, or for a period of six (6) months after the termination of this agreement. Employee also understands that the terms of this employment, including compensation, are confidential to Employee and The NLS Group. Disclosure of these terms to other parties may constitute grounds for dismissal.

While on the job site, the Employee shall comply with all applicable health and safety laws, rules, and regulations including provisions regarding protective clothing, head covering, eye protection, protective footwear, and all other applicable equipment. Employee agrees to submit to pre-employment, random, and for cause drug testing as required by the Employer's drug policy.

This Agreement shall be terminable by either the Employer or Employee upon 48 hours advance notice. Employer and Employee reserve the right to renegotiate this contract.

AGREED this 16th day of March, ~~19~~ 2000.

Northeastern Land Services, Ltd.

/s/ Jamison John Dupuy
Jamison John Dupuy
[Social Security Number Omitted]

By: /s/ Jessie B. Green
Jessie B. Green, Jr.,
Director of Project Management

No. 09-213

In the Supreme Court of the United States

NORTHEASTERN LAND SERVICES, LTD., DBA THE NLS GROUP, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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RUTH E. BURDICK
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Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether Section 3(b) of the National Labor Relations Act, 29 U.S.C. 153(b), authorizes the National Labor Relations Board (Board) to act when only two of its five positions are filled, if the Board has previously delegated its full powers to a three-member group of the Board that includes the two remaining members.

2. Whether the Board reasonably concluded that petitioner committed an unfair labor practice by maintaining an overly-broad confidentiality rule in its employment contract that employees would reasonably interpret as prohibiting them from discussing their terms and conditions of employment with union representatives.

3. Whether the Board reasonably concluded that petitioner committed an unfair labor practice by discharging an employee for violating a rule that is itself unlawful under the National Labor Relations Act.

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In the Supreme Court of the United States

No. 09-213

NORTHEASTERN LAND SERVICES, LTD., DBA THE NLS GROUP, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 560 F.3d 36. The decision and order of the National Labor Relations Board (Pet. App. 22-35) and the decision of the administrative law judge (Pet. App. 36-58) are reported at 352 N.L.R.B. 744.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 2009. A petition for rehearing was denied on May 20, 2009 (Pet. App. 59-60). The petition for a writ of certiorari was filed on August 18, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In enacting the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, Congress sought through "the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act." *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939); see 29 U.S.C. 151. To that end, the NLRA provides mechanisms to resolve questions concerning union representation peacefully and expeditiously, see 29 U.S.C. 159, and to remedy and prevent unfair labor practices, see 29 U.S.C. 158, 160.

Congress "confide[d] primary interpretation and application of [the NLRA] to a specific and specially constituted tribunal," the National Labor Relations Board (NLRB or Board). *Garner* v. *Teamsters, Local Union No. 776*, 346 U.S. 485, 490 (1953); 29 U.S.C. 153, 154, 159, 160. As originally constituted, the Board comprised three members, and the vacancy and quorum provisions of the Act provided: "A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum." National Labor Relations Act, ch. 372, § 3(b), 49 Stat. 451.[1]

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[1] Pursuant to that two-member quorum provision, the original Board, from 1935 to 1947, issued 464 published decisions with only two of its three seats filled. The Board had only two members during three separate periods during that time: September 1 until September 22, 1936; August 27 until November 25, 1940; and August 28 until October 10, 1941. See *Second Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1937*, at 7 (1937); *Sixth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1941*, at 7 n.1 (1942); *Seventh Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1942*, at 8 n.1 (1943). Those two-member Boards issued three published decisions in 1936 (reported at 2 N.L.R.B. 198-240); 237 published

In 1947, Congress enacted the Taft-Hartley Act, which enlarged the Board's unfair labor practice jurisdiction and amended Section 3(a) of the NLRA, 29 U.S.C. 153(a), to increase the Board's size from three to five members. See Labor-Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 139. Congress also amended Section 3(b) to authorize the Board "to delegate to any group of three or more members any or all of the powers which it may itself exercise," and amended the quorum requirements to provide that "three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof [respecting delegation]." *Ibid.* Since 1947, the overwhelming majority of the Board's decisions have been issued by three-member groups constituted pursuant to the Board's Section 3(b) delegation authority.[2]

b. In 2002, the Board solicited an opinion from the Department of Justice's Office of Legal Counsel (OLC) on the question whether the Board could continue to operate with only two members if the Board had previously delegated all of its powers to a group of three members. OLC, U.S. Dep't of Justice, *Quorum Require-*

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decisions in 1940 (reported at 27 N.L.R.B. 1-1395 and 28 N.L.R.B. 1-115); and 225 published decisions in 1941 (reported at 35 N.L.R.B. 24-1360 and 36 N.L.R.B. 1-45).

[2] See *Thirteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1948*, at 7, 9 (1949); Staff of the J. Comm. on Labor-Management Relations, 80th Cong., 2d Sess., *Labor-Management Relations* 6 (Comm. Print 1948); *1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. 44-46 (1988) (*Deciding Cases at the NLRB*, an attachment to the prepared statement of the NLRB Chairman).

ments, 2003 WL 24166831 (Mar. 4, 2003). Prior to that request, the Board had not issued decisions when it had only two members since Congress expanded the size of the Board to five members in 1947. *Id.* at *1. The OLC opinion concluded that, under Section 3(b), if the Board, at a time when it had at least three members, had "delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." *Ibid.*

In late 2007, the Board had four members but anticipated losing two of those members imminently when their recess appointments expired at the end of the year. Effective December 28, 2007, the four sitting members of the Board—Members Liebman, Schaumber, Kirsanow, and Walsh—delegated all of the Board's powers to a three-member group consisting of Members Liebman, Schaumber and Kirsanow.[3] *Laurel Baye Healthcare of Lake Lanier, Inc.* v. *NLRB*, 564 F.3d 469, 471 (D.C. Cir. 2009), petition for cert. pending, No. 09-377 (filed Sept. 29, 2009). After the recess appointments of Members Kirsanow and Walsh expired three days later, remaining Members Liebman and Schaumber, acting as a two-member quorum, continued to exercise the powers the

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[3] Also effective that day, the Board temporarily delegated to the General Counsel under Section 3(d) of the NLRA, 29 U.S.C. 153(d), full and final authority on behalf of the Board to initiate contempt proceedings for non-compliance with Board orders, to institute and conduct appeals to the Supreme Court, and to initiate and prosecute injunction proceedings, under Sections 10(e), (f) and (j) of the NLRA, 29 U.S.C. 160(e), (f) and (j). See Minute of Board Action (Dec. 20, 2007); NLRB, *Press Release No. R-2653, Labor Board Temporarily Delegates Litigation Authority to General Counsel; Will Issue Decisions with Two Members After Members Kirsanow and Walsh Depart* (Dec. 28, 2007) <http://www.nlrb.gov/shared_files/Press%20Releases/2007/R-2653.pdf>.

Board had delegated to the three-member group.[4] *Ibid.* Since January 1, 2008, that group, through its two-member quorum, has issued over 400 decisions.[5]

2. Section 7 of the NLRA, 29 U.S.C. 157, guarantees to employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 7 "necessarily encompasses the right [of employees] effectively to communicate with one another regarding self-organization." *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 491 (1978); see *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 542-543 (1972). Section 8(a)(1) of the NLRA prohibits employers from "interfere[ing] with, restrain[ing], or coerce[ing] employees in the exercise of [their Section 7] rights." 29 U.S.C. 158(a)(1).

In enacting the NLRA, Congress "did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice," but left to the Board "the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might

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[4] On July 9, 2009, the Senate received the President's nomination of Craig Becker, Mark Gaston Pearce, and Brian Hayes to be members of the National Labor Relations Board. 155 Cong. Rec. S7332 (daily ed. July 9, 2009).

[5] On May 4, 2009, it was reported that the two-member quorum of the group had issued approximately 400 decisions, published and unpublished. See Susan J. McGolrick, *Two Circuits Divide on Authority of Two-Member Board to Issue Rulings*, Daily Labor Rep. (BNA) No. 83, at AA-1. The published decisions and summary judgment rulings are reported and listed in 352 N.L.R.B. (146 decisions), 353 N.L.R.B. (132 decisions), and 354 N.L.R.B. (111 decisions as of November 27, 2009).

be charged as violative of its terms." *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 798 (1945). Pursuant to that authority and its duty to protect "the right of employees to organize for mutual aid without employer interference," *ibid.*, the Board has articulated standards for assessing the legality of employer rules governing employee behavior in the workplace. Under the standards developed to implement Section 8(a)(1), an employer may not promulgate or enforce a rule of conduct that "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998), enforced, 203 F.3d 52 (D.C. Cir. 1999); see *Cintas Corp.* v. *NLRB*, 482 F.3d 463, 468 (D.C. Cir. 2007) (employer's rule of conduct is overly broad in violation of Section 8(a)(1) when "employees would reasonably construe the [language of the rule] to prohibit Section 7 activity").

Consistent with the invalidation of overly-broad rules that would tend to deter exercise of Section 7 rights, the Board has long held that an employer violates the NLRA when it takes disciplinary action against an employee for violating such an unlawful rule. *Double Eagle Hotel & Casino*, 341 N.L.R.B. 112, 112 n.3 (2004) ("[W]here discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule."), enforced as modified, 414 F.3d 1249 (10th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

2. Petitioner is a temporary employment agency located in East Providence, Rhode Island, that supplies workers to clients in the natural gas and telecommunications industries, but pays those workers directly. Pet. App. 3. In July 2001, petitioner placed Jamison Dupuy as a right-of-way agent with El Paso Energy to assist

with the acquisition of land rights at a project in Massachusetts. *Ibid.* Before Dupuy's placement, petitioner required him to sign a temporary employment contract that included the following provision:

> Employee . . . understands that the terms of this employment, including compensation, are confidential to Employee and [petitioner]. Disclosure of these terms to other parties may constitute grounds for dismissal.

Id. at 3-4.

Subsequently, Dupuy complained to petitioner about repeated delays in receiving his paychecks from petitioner. Pet. App. 4. Dupuy expressed particular concern about the delays in payment because petitioner required him to pay up front for job expenses such as hotel bills and to seek reimbursement later. *Ibid.* An executive working for petitioner was unable to secure alternative arrangements for reimbursing Dupuy. *Ibid.*

In early October 2001, Dupuy raised additional job-related concerns directly with a project manager at El Paso Energy. Pet. App. 3-5. In the course of those conversations, Dupuy asked the project manager whether Dupuy could work for El Paso Energy through a different employment agency because petitioner was not paying him in a timely manner. *Id.* at 4. The project manager denied Dupuy's request, and gave him contact information for an agent of petitioner who might be able to resolve his pay issues. *Id.* at 4-5.

Dupuy directly involved El Paso Energy in his employment-related disputes a second time after petitioner reduced its reimbursement to Dupuy for work-related use of his personal computer. Pet. App. 5. Initially, Dupuy had been reimbursed $15 per day for com-

puter usage, which was treated as a nontaxable expense. *Ibid.* Petitioner later informed Dupuy that it was reducing the rate to $12 per day. *Ibid.* When Dupuy complained that El Paso Energy had authorized, and he had been billing, $15 per day for computer usage, petitioner's human-resources staff told him that it had reclassified the expense as taxable compensation, which increased petitioner's overhead costs and required an offsetting reduction in pay to Dupuy of $3 per day. *Ibid.* When Dupuy replied by email, he sent a copy to the project manager at El Paso Energy, asking El Paso Energy to "offset [the] surcharge and additional tax burden." *Ibid.*

On October 11, 2001, petitioner's executive vice president telephoned Dupuy and told him that, although petitioner had tried to accommodate Dupuy's requests, it was unable to do so and had decided to terminate Dupuy's employment. Pet. App. 6. When Dupuy pressed for the reason for his discharge, petitioner's executive replied that Dupuy had "not lived up to [his] end of the bargain with [petitioner]." *Ibid.* (first brackets in original). The executive later testified that he was referring to Dupuy's failure to comply with the confidentiality provision in his employment agreement. *Id.* at 7.

3. Dupuy filed an unfair labor practice charge on October 24, 2001, and an amended charge on December 17, 2001. Pet. App. 7. On January 16, 2002, the Board's general counsel issued a complaint alleging that petitioner violated Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by maintaining an overly-broad confidentiality rule in its employment contract and by discharging Dupuy for violating that invalid rule. Pet. App. 7, 23. After holding a hearing, the administrative law judge (ALJ) issued a decision in June 2002 finding that peti-

tioner's confidentiality provision did not violate Section 8(a)(1), and dismissing the complaint. Pet. App. 27, 36-58. The ALJ found that, although petitioner's confidentiality rule restricted employees in exercising their right to discuss their terms and conditions of employment, petitioner had proffered a legitimate business justification for the rule that outweighed its burden on the exercise of employees' rights. *Id.* at 27, 50-57.

After the general counsel and charging party Dupuy filed exceptions to the ALJ's decision, the two-member Board quorum issued a decision in June 2008, reversing the ALJ's decision and finding that petitioner's confidentiality provision was unlawful. Pet. App. 22-35. The Board applied its recent decision in *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004), which applied the *Lafayette Park* rule and was issued after the ALJ issued his decision in this case. Pet. App. 27-28. In *Lutheran Heritage*, the Board explained that, in assessing the validity under Section 8(a)(1) of a employer's rule, it engages in a two-step inquiry. 343 N.L.R.B. at 646-647. First, the Board stated that a rule that "*explicitly* restricts activities protected by Section 7" violates Section 8(a)(1). *Id.* at 646. Second, the Board explained that a rule that does not explicitly restrict Section 7 activity will nevertheless violate Section 8(a)(1) if any one of the following is true of the rule: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647. See *Guardsmark, LLC* v. *NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007). Applying the second prong of that two-step inquiry, the Board determined in this case that petitioner's employees would reasonably construe the confi-

dentiality provision as prohibiting them from discussing the terms and conditions of their employment with union representatives. Pet. App. 27-28.

Based on its finding that petitioner's confidentiality rule was unlawful, the Board concluded that petitioner's discharge of Dupuy for failing to comply with the rule violated Section 8(a)(1) because it was concededly based on the invalid rule. Pet. App. 29. The Board ordered petitioner to rescind its overly-broad rule and to notify employees of the rescission. The Board also ordered petitioner to offer reinstatement to Dupuy and to make him whole for losses suffered as a result of petitioner's unlawful conduct. *Id.* at 31-34.

4. Petitioner filed a petition for review of the Board's order in the United States Court of Appeals for the First Circuit, and the Board cross-applied for enforcement of its order. Pet. App. 1-2. Petitioner challenged the authority of the two-member quorum of the delegee group to issue the decision and order, and disputed the Board's finding that petitioner had engaged in unfair labor practices by maintaining its confidentiality provision and by firing Dupuy. *Id.* at 10-21. The court of appeals enforced the Board's order and denied petitioner's petition for review. *Id.* at 2, 21.

On the question of the Board's authority to operate with its two remaining members, the court of appeals held that Section 3(b) of the NLRA, 29 U.S.C. 153(b), allows the NLRB to continue to function when its two remaining members constitute a two-member quorum of a three-member group to which the Board had validly delegated its powers. Pet. App. 10-14. The court explained that Section 3(b) "allowed the Board to delegate all of its powers to a three-member group," and that the subsequent "vacancy, which left the two-member quo-

rum remaining, may not, under the terms of section 3(b), impair the right of the two-member quorum to exercise all powers of the Board." *Id.* at 12.

Turning to whether petitioner's confidentiality rule violated Section 8(a)(1), the court of appeals upheld the Board's application of *Lutheran Heritage* and *Lafayette Park* to find that the confidentiality provision would reasonably tend to chill employees' exercise of their Section 7 rights. Pet. App. 14-19. The court found that the Board's determination that the language of the confidentiality provision "could be fairly read to extend to disclosure of terms of employment to union representatives" was "supportable," noting that the "precise subject matter of the forbidden disclosure—terms of employment, including compensation—went to a prime area of concern under Section 7." *Id.* at 17. The court also found the Board's interpretation to be consistent with its prior cases. *Id.* at 17-18 (citing *Cintas Corp.*, 344 N.L.R.B. 943, 943 (2005), enforced, 482 F.3d 463 (D. C. Cir. 2007)).

The court of appeals rejected petitioner's contention that the Board could not find a violation of Section 8(a)(1) without evidence either that petitioner actually enforced the rule to prevent employees from discussing terms and conditions of employment among themselves or that the rule had, in fact, chilled union activity. Pet. App. 15-16. The court also rejected petitioner's argument that this Court's decision in *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945), required the Board to find that petitioner's rule was justified by legitimate business reasons. Pet. App. 18.

The court of appeals also upheld the Board's finding that petitioner's discharge of Dupuy for failing to comply with the unlawful confidentiality rule was itself unlawful. Pet. App. 19-21. As the court explained, "[u]n-

der the Board's precedent, where the Board finds an employer rule is invalid, discharge for violating that rule is invalid." *Id.* at 19-20 (citing *Saia Motor Freight Line, Inc.*, 333 N.L.R.B. 784, 785 (2001); *Double Eagle Hotel & Casino*, 341 N.L.R.B. 112).

ARGUMENT

1. In its first question presented, petitioner asks this Court to decide whether Section 3(b) of the NLRA authorizes the NLRB to act when only two of its five positions are filled, if the Board has previously delegated its full powers to a three-member group of the Board that included the two remaining members. On November 2, 2009, this Court granted the petition for a writ of certiorari presenting the same question in *New Process Steel, L.P.* v. *NLRB*, No. 08-1457 (*New Process*). The Court therefore should hold the petition in this case pending its resolution of *New Process* and then dispose of the petition accordingly with respect to the first question presented.

2. In its second and third questions presented, petitioner challenges the Board's substantive unfair labor practices determinations. Because the court of appeals' decision affirming the Board's finding of unfair labor practices was correct and does not conflict with any decision of this Court or any other court of appeals, further review is not warranted. Thus, regardless of how the Court disposes of the first question presented in light of its decision in *New Process*, the Court should deny the petition as to the second and third questions presented.

a. Petitioner argues (Pet. 13-19) that, in finding that petitioner's confidentiality rule was overly broad in violation of Section 8(a)(1) of the NLRA, the Board "abandoned" the balancing test it claims this Court mandated

in *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945), and departed from the governing Board precedent set forth in *Lafayette Park Hotel*, 326 N.L.R.B. 824 (1998), and *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004). Further review of that argument is not available, however, because petitioner failed to raise it before the Board, and that failure deprived both the court of appeals and this Court of jurisdiction to consider it. Section 10(e) of the NLRA, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." This Court has strictly construed that provision, holding that Section 10(e) is a jurisdictional bar when an issue has not been presented to the Board, and that the failure to present an issue to the Board precludes subsequent judicial consideration of the issue. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

That rule applies even where, as here, a party's first opportunity to present an argument to the Board would be in a motion for reconsideration after the Board issues its decision. *Woelke & Romero Framing, Inc.*, 456 U.S. at 665-666; *International Ladies' Garment Workers' Union*, 420 U.S. at 281 n.3. Although the ALJ applied a balancing test of the sort petitioner advocates in finding that petitioner's business justification for its confidentiality rule outweighed the rule's infringement of employee's Section 7 rights, Pet. App. 56-57, the Board reversed the ALJ under the rule articulated in *Lafayette Park* and *Lutheran Heritage*, *id.* at 14-19. After the

Board's decision issued, petitioner had the right to file a motion for reconsideration by the Board on the grounds asserted in its petition before this Court—namely, that the Board's decision constituted an impermissible departure both from the balancing test it alleges this Court required in *Republic Aviation* and from the Board's decisions in *Lafayette Park* and *Lutheran Heritage*. Petitioner has not identified any "extraordinary circumstances" that would excuse its failure to raise those issues to the Board. Accordingly, this Court is jurisdictionally barred from considering them.

It is true that the Board did not argue to the court of appeals that Section 10(e), combined with petitioner's failure to present its arguments to the Board, deprived the court of jurisdiction to consider petitioner's argument that the Board departed from this Court's decision in *Republic Aviation*. That failure does not preclude the Board from relying on Section 10(e) now, however; because Section 10(e)'s bar is jurisdictional, the Board may raise it for the first time before this Court. See *May Dep't Stores Co.* v. *NLRB*, 326 U.S. 376, 386 n.5 (1945) (Section 10(e) authorizes "[t]his Court * * *, *sua sponte*, to appraise the record to determine the power of the Circuit Court to review" issues presented to this Court); see also *Woelke & Romero Framing, Inc.*, 456 U.S. at 665-666.

b. In any event, even if this Court were not jurisdictionally barred from considering petitioner's arguments, those arguments do not merit further review because the court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. Petitioner asserts (Pet. 13-16) that the Board and the court of appeals abandoned the approach of this Court's

decision in *Republic Aviation*. In that case, the Court stated:

> These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.

324 U.S. at 797-798.

The test articulated in *Lafayette Park* and further explicated in *Lutheran Heritage* inquires whether an employer's rule "would reasonably tend to chill" activity protected under Section 7 because employees "would reasonably construe" the language of the rule to prohibit such activity. *Lafayette Park*, 326 N.L.R.B. at 825; *Lutheran Heritage*, 343 N.L.R.B. at 647. As petitioner apparently acknowledges (Pet. 14-17), the Board's development and articulation of that test faithfully implements the role this Court envisioned for the Board in *Republic Aviation* by balancing the competing legitimate interests of employers and employees. Indeed, the Board specifically recognized in *Lafayette Park* that, consistent with *Republic Aviation*, the Board's policies concerning employer workplace rules must "work[] out an adjustment" between Section 7 rights and "the equally undisputed right of employers to maintain discipline in their establishments." *Lafayette Park*, 326

N.L.R.B. at 825 (quoting *Republic Aviation*, 324 U.S. at 797-798). Thus, the *Lafayette Park* inquiry itself integrates both the right of employees to discuss their terms of employment and the substantial and legitimate interest of employers in maintaining the confidentiality of private information.

Opting not to challenge the validity of the test articulated in *Lafayette Park* and *Lutheran Heritage*, petitioner instead asks (Pet. 16-19) this Court to review the Board's application of that test to the facts of this case, asserting that the Board was required to find that petitioner's rule actually chilled employees in the exercise of their rights under Section 7. But petitioner's argument is misplaced. As one court of appeals explained in rejecting an identical argument, "[t]he Board is merely required to determine whether 'employees *would reasonably* construe the [challenged] language to prohibit Section 7 activity,' * * * and not whether employees *have* thus construed the rule." *Cintas Corp.* v. *NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007) (citations omitted). Petitioner cannot identify any decision from this Court or from any other court of appeals that would require the Board to find that an overly-broad rule that is reasonably likely to chill employees in the exercise of their Section 7 rights has actually prevented employees from exercising those rights before it may conclude that the rule violates Section 8(a)(1).[6]

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[6] Petitioner argues (Pet. 16-17) that *Lutheran Heritage* requires an evidentiary showing that an employer actually applied an overly-broad rule to conduct protected by Section 7. But petitioner misconstrues the quoted language from *Lutheran Heritage*, which discussed the validity of an employer's rule "prohibiting 'abusive or profane language.'" 343 N.L.R.B. at 647 (citation omitted). The Board determined that the rule in question did not violate Section 8(a)(1) in that case because "there

c. Further review of petitioner's argument (Pet. 20-21) that the court of appeals erred in concluding that petitioner violated the NLRA by disciplining Dupuy for violating its unlawful confidentiality rule is also not warranted. Petitioner challenges the Board's application in this case of its rule that an employer's discharge of an employee for that employee's failure to comply with a rule that itself violates Section 8(a)(1) is also unlawful. Petitioner claims that such a discharge cannot be unlawful where the activity in which the employee actually engaged was not protected by Section 7. But petitioner misunderstands the policy underlying the Board's rule. By prohibiting employers from discharging an employee for failing to comply with a rule that is itself unlawful under Section 8(a)(1), regardless of whether the employer could have validly prohibited the employee's behavior with a different rule, the Board ensures that employees are not deterred in the exercise of their rights out of fear that they might be disciplined for violating the invalid rule. See *Double Eagle Hotel & Casino* v. *NLRB*, 414 F.3d 1249, 1258 (10th Cir. 2005) (the Board's policy "reduces the chilling effect that results from imposition of overbroad rules"), cert. denied, 546 U.S. 1170 (2006); *Jeannette Corp.* v. *NLRB*, 532 F.2d 916, 920 (3d Cir. 1976) (holding that a rule that is invalid on its face under Section 8(a)(1) "cannot be enforced" and an employee's discharge for violating the rule "cannot be sustained" regardless of whether the employee was engaged in protected, concerted activity).[7]

[was] no basis for a finding that a reasonable employee would interpret a rule prohibiting such language as prohibiting Section 7 activity." *Ibid.*

[7] Petitioner's reliance (Pet. 21) on *Yesterday's Children, Inc.* v. *NLRB*, 115 F.3d 36 (1st Cir. 1997), is misplaced. That case did not involve application of an overly-broad employer rule that would reason-

Regardless of the validity of the Board's rule, its application of that rule in this case does not warrant further review because petitioner fails to identify any decision of this Court or of any other court of appeals that conflicts with the decision below.[8]

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ably tend to chill employees' protected conduct. Rather, that case involved an employer's disciplining an employee for engaging in particular conduct—making a personal call during working hours—and the court of appeals noted that the Board should have determined whether that conduct was protected activity under Section 7. That case has no application where, as here, the Board correctly found that an employer rule itself violates Section 8(a)(1).

[8] Nor is review warranted of petitioner's further argument (Pet. 21-22) that the court of appeals' enforcement of the Board's reinstatement and backpay order conflicts with Section 10(c) of the NLRA, 29 U.S.C. Section 160(c), which provides that the Board shall not require reinstatement or backpay if an individual was discharged for cause. Even if the Court were not jurisdictionally barred from considering that argument under Section 10(e), 29 U.S.C. 160(e), due to petitioner's failure to raise it before the Board, see pp. 13-14 *supra*, petitioner essentially asks this Court to make a factual finding that it discharged Dupuy for cause. But petitioner concedes (Pet. 8) that it discharged Dupuy for violating the invalid rule, and that was the only reason it gave for his discharge. Under longstanding Board precedent, an employer who disciplines an employee pursuant to an overly-broad rule can justify the discharge by demonstrating that the employee interfered with the employer's business operations, "and that this rather than violation of the rule was the reason for the discharge." *Miller's Discount Dep't Stores*, 198 N.L.R.B. 281, 281 (1972), enforced on other grounds, 496 F.2d 484 (6th Cir. 1974). Petitioner made no such demonstration.

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be held pending the Court's disposition of *New Process Steel, LP* v. *NLRB*, cert. granted, No. 08-1457 (Nov. 2, 2009), and then be disposed of accordingly. With respect to the second and third questions presented, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2009